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TRIAL OF CIVIL SUITS IN MOFUSSIL COURTS.*

WE have on our table a pamphlet entitled "Practical Hints for the trial of Civil Suits and the Execution of Decrees in Mofussil Courts." We have carefully gone through the whole of it. In our opinion it is a most valuable contribution to the legal literature of the day. It is full of the most useful directions to the Judge and the Practitioner in the conduct of civil suits from beginning to end. Although the hints are nothing more than the rules of procedure to be found in the Civil Procedure Code and the Law of Evidence, now in force, and although Act VIII. of 1859 has been introduced into all the Civil Courts for more than fifteen years, the practice of the most of them with regard to the framing of issues, the reception of documentary evidence and the mode of examining witnesses, is anything but strictly legal, owing simply to the want of proper legal training of the Judges and Pleaders of such Courts. Under such circumstances, essays like the one under review, are undoubtedly to do immense good to the Bench, the Bar and the public, and introduce uniformity of practice throughout India. We feel no hesitation in recommending this work to the public. To enable our readers to judge of the usefulness of this work, we make the following extracts :—

"4. On the occasion of framing issues, the Court ought to hear all the parties to the suit, and invite them to suggest the issues, which they think necessary for the proper trial of the matter in dispute between them, and in the event of the Court not adopting an issue suggested to it by a party, it should, if the suggesting party desires it, make a note of its refusal and the reasons for it.

* Practical Hints for the trial of Civil Suits, and the Execution of Decrees, in Mofussil Courts.—By a Lawyer. Published by Messrs. Thacker, Spink and Co., Calcutta, 1874.

The importance to the Court itself of framing single and distinct issues is seldom rightly appreciated by judicial officers. The way to a right judgment can only be found by closely considering the plaint, and by extracting from it the precise character of the plaintiff's right of suit. In any given case unless the issues correspond with this in the simplest form which they can be made to take, it is tolerably certain that the Court which framed the issues did not understand what it had to try. An issue in the form so often seen of a group of entangled questions is no issue at all. It is simply indicative of indolence or ignorance on the part of the Court which framed it, and productive of nothing but mischief at the trial. And a double, alternative, issue generally shows that the Court does not see clearly on which side or in what manner it arises. In most cases the difficulty of the trial has been overcome when the right issues have been accurately framed.

7. When the course of the trial has been once entered upon, it should not afterwards be interrupted, but should be continued, from day to day, if necessary, until it is ended.

8. If the judicial officer, who has commenced a trial, is for any cause prevented from carrying it out to a due termination, his successor should always commence it anew, unless the parties expressly consent to his taking the trial up at the point where the first officer left it, so far as this is possible to be done. And in either case reasonable notice of the resumption of the proceedings should be given.

In a properly conducted trial the attitude which the parties assume towards each other at the outset, the statement of his case made by the attacking party, the *questions* put by the parties to the witnesses, both in examination and cross-examination, irrespective of the witnesses answers, and the behaviour of the witnesses themselves, inclusive of their *manner* of answering the questions are materials generally pregnant with indicia of the real merits of the case between the parties; and therefore a judicial officer who, as a Court of first instance, determines a suit without having personally conducted the *whole* of the trial (especially the earlier portion of it), is without the best aids towards arriving at a just decision, and indeed is not better situated than an Appeal Court.*

9. The trial should begin (whether issues have been previously settled or not) by the party on whom the burden of proof lies, and who for the

* This is exactly in accordance with the Privy Council Ruling in *I., Legal Companion, Civil Rulings*, p. 78.—ED., *L. C.*

time may be designated the proving party stating the case, which constitutes his cause of action, or defence, as the case may be, and giving the substance of the facts, which he proposes to establish by his evidence.* The case thus declared ought to reasonably accord with the party's pleadings, *i. e.*, plaint, or written statement, because no litigant can be allowed to make at the trial a case materially different from that he has placed on record, and which his adversary is prepared to meet. And the facts proposed to be established must in the whole amount to so much of the material part of his case, as is denied or controverted in his opponent's pleadings, and which, if proper issues have been framed, will be found concentrated in them.

10. After stating his case, the party should call his witnesses *seriatim*, and by questions, narrative in their result but not leading, should elicit from each of them the material facts to which he can speak of his own perception. A general invitation to a witness to tell what he knows, or to state the facts, of the case, should as a rule not be allowed, because it gives an opening for a prepared story, which detailed questioning would not afford, and also invariably leaves such facts as so come out in a very unprecise form.

11. The examination of the witness should be effected by the party who calls him, or by his pleader. The questions should be simple and so framed as to elicit from the witness, as nearly as may be in chronological order, all the facts relevant to the subject in issue between the parties, which he has witnessed, *i. e.*, in any manner directly observed; but on any disputed point they should not be such as to *lead*, or suggest, the answer; nor such as to induce a witness, other than an expert to state a conclusion of his reasoning, an inference of fact, or a matter of belief in the place of describing what he actually observed. In the like manner, the cross-examination should be effected by the opposite side, only that in this case leading questions may generally be allowed. Then should follow re-examination by the first side for the purpose of enabling the witness to explain answers, which he may have imperfectly given on cross-examination, and to add observed facts made relevant by the cross-examination. During the course of this examination and cross-examination, the presiding officer ought not to interfere, except when necessary for the purpose of causing questions to be put in a clear and proper shape, of checking improper questions, and

* Judicial officers will see the importance of this hint and should try to see it carried out in every case. —ED., L. C.

of making the witness give precise answers. At the end of it however, if it has been reasonably well conducted, he ought to know pretty nearly the exact position of the witness, with regard to the material facts of the case; and he may then, should he find it expedient, examine the witness further, with the view to obtaining the means of gauging the value of his testimony in critical particulars.

No one can examine a witness in chief, either efficiently or without loss of time, who is not thoroughly acquainted with the witness's situation relative to the occurrences of the case, and does not beforehand know the facts to which he can honestly depose from personal observation. The witness cannot be kept to the bare statement of that which he himself personally saw, or otherwise perceived except through careful questioning by one who already knows all the facts and occurrences, of which the person questioned was a witness. And inasmuch as no question in chief relative to any contested matter should be leading in its nature, it can be seen at once that the examination of a witness in chief is the most difficult, and responsible part of the duty of one charged with the conduct of a case in Court. This is acknowledged to be so in England, and it is rendered still more so in this country, by the almost invincible disposition, whether natural or acquired, of every witness to tell the whole case of his side from beginning to end, without distinguishing those parts, which he actually witnessed, from the rest which he did not. Unfortunately, most judicial officers in the Mofussil are indifferent to, probably because they are unaware of, the extreme importance of this point, and many think that no skill or experience is needed to examine a witness in chief. It is usually left almost a matter of accident, whether or not a witness's deposition is confined to facts of his personal observation.

For the foregoing reasons, the Court itself should rarely attempt to examine a witness in chief.

Cross-examination may be directed to several different objects: 1st, to show that the witness is not worthy of credit, either generally, or in regard to particular statements; 2nd, to reduce the witness's evidence to its true dimensions, as a statement of observed facts; 3rd, to elicit from him facts favourable to, or corroborative of, the case of the cross-examining party; 4th, to obtain from the witness admission or explanation of acts attributed to him by the cross-examining party's evidence, and in a sense to confront the witnesses of both sides, who speak to the same facts, and so on. It is seldom that there is any reasonable

probability of pursuing the first of these with success, or indeed any good ground for aiming at it; yet it, and it alone, is almost universally the object of the cross-examiner in the Mofussil Court. On the other hand, the cross-examiner almost never attempts to effect either the second, third, or fourth object; although it is apparent on very little consideration that unless these are effected the Court is without any efficient guide to a proper estimate of the value of the testimony given.

General or abstract statements of fact on the part of a witness, either in examination or cross-examination are worse than useless. The following are examples:—

1. "The plaintiff has always possessed a 4-a share of village A: I have been a cultivator in that village ever since I came to years of discretion, and my father was so before me, therefore I know."

2. "I am a mohurrir in the plaintiff's kuthi: the defendant came there in Falgoon 1278, and signed four hundis for Rs. 1,000 each. The hundis were shown to the witness who identified and attested the signatures."

3. "I was present when the Darogah arrested the prisoner, and heard him confess that he had stolen the prosecutor's money."

4. "The plaintiffs were dispossessed from the 1st kitta, ten or eleven years ago, and from the remaining kittas about three or four years."

The mischief of these and similar statements is manifold: they do not present original facts actually perceived by the witness, but only inferences drawn by him from undisclosed facts. They are therefore not material upon which a judicial opinion ought to be placed, although no doubt at first sight, they may appear to possess considerable evidential force. Also, in making such statements as these, the witness runs no risk of a conviction for perjury in the event of the foundation for them being false, or imaginary, to his knowledge.

The judicial officer ought not to accept testimony in this shape; it cannot be reiterated too often that he should insist upon the witness stating precisely that which he immediately saw or experienced. It is most important that full effect should be given to Section 60 of the Indian Evidence Act.

In the case of ex. (1) above given, the witness should have been confined to the statement of the acts of the plaintiff, or the facts and occurrences which he, the witness, had himself seen (if any) such in nature as to indicate possession on the part of the plaintiff of a 4-a share of the village. Payment by witness of $\frac{1}{4}$ th of his rent to the plaintiff,

and of the remaining $\frac{3}{4}$ th to other shareholders, would be a fact of this nature. So also would be the division into shares of the aggregate collections of the village when made, and the subsequent payment of $\frac{1}{4}$ th thereof to the plaintiff, and so on.

In the case of ex. (2) the witness should have been made to describe the event of the signing, and in particular should have been made to state expressly the fact of having seen the defendant write the signature, shown to him, the witness, at the moment of his speaking, and then referred to by a mark put against it by the Court.

In the case of ex. (3) the witness should have been made to repeat, as nearly as he could, the actual words, which he had heard the prisoner use to the Darogah.

In the case of ex. (4) the witness should have been made to state separately the facts of the occurrence which he had witnessed, and which constituted the dispossession or ouster of the plaintiff from the 1st kitta; and the like with regard to each of the remaining kittas.

And in all cases alike, the witness should have been prevented from making the general statement even as a preliminary to the subsequent statement of the specific facts which he actually witnessed. This rule is most important to be observed.

The present almost universal practice of allowing each witness to give his account of the matter in dispute, and to narrate what he conceives to be the case of the party, who calls him is most vicious; and has in large measure led to the very general and blameable disregard of parol testimony, which is exhibited in Mofussil Courts. As long as this practice continues, it cannot be matter of surprise (though it must always be of regret) to find in judgments even of experienced Judges, such remarks as the following. "The witnesses on each side as usual support the case of the party who called them, and therefore I pass on to the consideration of the documentary evidence." It is not, however, generally perceived by the Judges who use this language that unless the admission of documents is governed by the observance of the rules, which follow this note, the evidence afforded by them is even more frail, and less trustworthy than that of imperfectly examined witnesses.

12. Every document or writing, which a party intends to use as evidence against his opponent, should be formally tendered by him at that stage in the course of proving his case, to which it properly belongs in point of time. For this purpose it should be taken from the file of the case if it has been put on it before the trial, otherwise, it should be

called for from, and produced by, the person in whose custody it is. If the opponent does not then object to the document being admitted in evidence, and if the document is not such as is forbidden by the legislature to be used as evidence, the judicial officer should admit it, and having marked it with a distinguishing mark, or letter by which it should when necessary be ever after referred to throughout the trial, should cause it to be read aloud.

Sect. 132, of the Civil Procedure Code, applies generally, and prescribes what must be done by the Court, whenever an exhibit is presented to it for the purpose of its being filed, and of being ultimately offered as evidence between the parties; the rule which is here enunciated and those which follow have the effect of separating (and placing in order), those documents which have been *actually received and used as evidence* between the parties *at the trial* from all others.

13. If however on the document being tendered, the opposite party objects to its being admitted in evidence, then commonly two issues arise; 1st, whether the document is authentic, in other words, is that which the party tendering it represents it to be; and 2nd, whether supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it. The latter issue, in general, is matter of argument only, but the first must be supported by such testimony as the party can adduce. If the judicial officer is of opinion that the testimony, adduced for this purpose, developed and tested by cross-examination, makes out a *prima facie* case of authenticity, and is further of opinion that the authentic document is evidence admissible against the opposite party, then he should admit the document and have it read, as he would have done had it not been objected to. But whether the document is admitted or not, it should be marked as soon as any witness makes a statement with regard to it; and if not earlier marked on this account, it should at latest be marked when the Court decides upon admitting it. Also every passage, word, entry, signature, &c., in a document to which any witness is made to speak, either in examination in chief or in cross-examination (whether this be during the inquiry as to the admissibility of the document or not), should be marked with an additional mark; and in the taking down of the witness's evidence, his statement relative to the passage, &c., should be connected therewith by reference to this mark. Thus if the witness speaks to the act of signing a document on the part of another person X, his written deposition would run somewhat as follows:—"X signed a paper in my

presence. I could recognize it again if I saw it. (The paper marked A was then shown to the witness.) "This paper A is the paper" (or resembles the paper) which I saw X sign; I saw him write that passage (or signature) A."

14. But before a witness is allowed to, in any way, identify a document, he should generally be made by proper questioning to state the grounds of his knowledge with regard to it. For instance, if he is about to speak to the act of signature, as just above supposed, he should first be made to explain concisely the occurrences which led to his being present on the occasion of the signing: and if he is about to recognize a signature on the strength of his knowledge of the supposed signer's hand-writing, he should be made to state the mode in which this knowledge was acquired. This should be done by the party, who is seeking to prove the document; and the opposite party, if he desires to do so, should be allowed to interpose with cross-examination on this point. And it is the duty of the Court, in the event of a witness professing to recognize or identify writing, always to take care that his capacity to do so is thus tested, unless the opposite party admits it. And if on the examination effected for this purpose, it appears that the witness was not in fact present at the time of signing or is not reasonably competent to identify the hand-writing, then the judicial officer ought not to receive his testimony on the matter of the signature.

15. The signature of one person, which purports or which appears by the evidence, to have been written by the pen of another is not proved until both the fact of the writing, and the authority of the writer to write, the name on the document is proved. And in the case of the signature of a pardanisheen,* evidence should also be given of her identity with the signer, and of her knowledge of the document signed, before proof of the signature be considered sufficient to justify the admission of that document in evidence. Similarly too, in the case of an illiterate person, who cannot read, and who makes his mark instead of signing.

16. When a document purports to be 30 years' old, or upwards, or when it is proved by evidence to the satisfaction of the judicial officer, or is admitted by the other side that by reason of death or other sufficient cause, no witness can be produced to testify to the act of signing, or to the signature, of the person whose signature is necessary to the validity of the document in evidence, then the document may be proved

* Vide Privy Council Ruling to the same effect in 10, B. L. R., p. 205.—ED., L. C.

by evidence of a secondary character. And the best evidence of this sort is evidence which tends to show that the document has since its date remained in the custody, in which it might reasonably be expected to be, if it be assumed to be genuine. Its mere production in Court by the person in whose hands it ought for this reason to be, if not challenged by cross-examination, or otherwise qualified, may be sufficient for this purpose ; but the judicial officer ought always, when he has the opportunity of doing so, to elicit the facts of its previous custody.

Very curious misapprehensions of the maxim that a deed, which is 30 years' old, proves itself are prevalent. Some judicial officers even suppose it to go so far as to authorize the admission, without any proof whatever, of every document which on the face of it purports to be 30 years' old. This is very erroneous. In its true meaning the maxim merely modifies the general rule that all documents, which derive their force from the person who executed them, must be proved by establishing the fact of the execution ; the maxim simply lays down that after 30 years the execution must speak for itself, because it must then be presumed that all witnesses to it are dead, and therefore it relieves the party who desires to use the document from the obligation to prove the execution. Nevertheless the Court cannot receive the document, if it is objected to, without some evidence of authenticity ; and according to Section 90, of the Indian Evidence Act, this must be evidence of custody.*

17. Whenever a copy of a document, instead of an original, is tendered in evidence by any party and facts are proved, which entitle that party to use a copy of this document as against the opposing party, then, unless this alleged copy is admitted by the opposing party, before the judicial officer can receive it in evidence not only must such facts be proved with regard to the original as would render it admissible in evidence, if it were being tendered in Court, *i. e.*, the facts of signature or otherwise which have just been referred to in the immediately foregoing paragraphs, but also the document which is actually tendered must be proved to be a correct copy of the thus proved original.

In the great majority of cases, in which copy documents are used in evidence instead of originals, the copy document comes from some public office or record room, and then the official seal or endorsement which it bears affords *primā facie* evidence of its being a correct copy

* This is in accordance with the decision of the Calcutta High Court to be found in II., L. C., Civil Rulings, p. 75.—ED., L. C.

of an original filed in or presented to the office, where the copy purports to have been made. But although the correctness of the copy may be thus sufficiently proved, it still remains to the party who tenders it instead of the original, to prove *that* original, before the copy can be admitted in evidence—that is, the original from which the copy produced was made; and for this purpose the entire history of ~~this~~ original including the facts of the first making of it, and the deposit of it in the office or other place from which the copy comes must be made out.

18. In any case, wherein a commission has been issued by the Court for the examination of witnesses before trial, the party who desires to use in evidence a deposition, which has been taken under the commission must tender the same at the trial, and if the opposing party objects to its admission in evidence, he must prove, first, that the deponent is not present to be examined *viva voce* and that there is good and sufficient reason for his absence, and second, that the deposition was duly taken, and that the opposing party was present at the time of its being taken, or had reasonable opportunity afforded him of being so. The opposing party if he desires, it must be allowed to adduce evidence to rebut the evidence produced by his adversary for this purpose. And if on the whole, the judicial officer is satisfied that these conditions are established, he should receive the deposition in evidence, and cause it to be read; otherwise he should refuse to receive it.

19. Whenever a judicial officer refuses to receive any evidence of any kind, which is tendered, or refuses to allow any question to be put, he should, if either party requests it, record the fact, and the reasons for his refusal. Also if he receives evidence, or allows a question to be put notwithstanding objection made, he should at the request of the objector, record the objection, and the reason for overruling it.

20. When according to the foregoing directions, the party upon whom the burden of proof first lay, has stated his case, and the witnesses adduced by him have been examined, cross-examined, and re-examined, and all the documents tendered by him have been either received in evidence or refused, then it devolves upon each of the opposing parties to state their respective cases in succession; and when all of them have done this, then the evidence whether oral or documentary adduced by each in order, should be dealt with precisely as in the case of the first party. And on its termination, the first party should be allowed to comment in reply upon his opponents' evidence.

21. If, however, the case of an opposing party is such as to intro-

duce into the trial matter, which is foreign to, and outside the case of the first party, and the evidence given by him, then the latter must be allowed, if he so desires, to rebut this by additional evidence and his opponent must be allowed to speak upon it by way of reply, before the first party himself makes his own reply, as just mentioned.

22. The judicial officer, who presides at any trial, has discretion to recall any witness of any party for further examination or cross-examination, whenever he thinks it necessary to do so, but the before-mentioned order ought not to be departed from without good reason.

23 The power which is conferred upon the Court by Section 138, of the Civil Procedure Code, may also be exercised at any time during the trial, subject to the qualification prescribed in the last rule. But it must be remembered by judicial officers that all evidence, which is procured in this manner, must be adduced in open Court before the parties at a hearing, or at an adjourned hearing of the suit, and can only be received, and considered as evidence between the parties, in accordance with the foregoing rules.

Very serious misuse of this power is unfortunately common. Many judicial officers think that by virtue of this Section, anything which is upon the record of any other case, may be used as evidence in the suit which is being tried. Appellate Courts even constantly send for records behind, the backs of the suitors, and take materials from them to influence their judgment. This is a grievous infraction of the golden rule that nothing can be used as evidence between the parties, which has not been adduced in their presence in open Court, and subjected to all proper tests; and it is productive of incalculable mischief.

24. As the trial proceeds, a sort of trial nathi should be gradually formed, constituted of the depositions of the witnesses as they are successively examined, and of the various documents as they are tendered, and received in evidence. The depositions should be arranged in the order in which they are taken, and the documents in the order in which they are marked, in both instances as near as may be. For this purpose, *every* document which is tendered and received in evidence, should be taken from the witness who produces it, or from the general file of the suit, if it is already there, and upon being read should be immediately put upon the trial nathi. And every document, which is tendered and not received, should upon being marked as above directed, be returned to the person or party to whom it belongs. If a document, which is in any way used in evidence, already forms part of another record, for instance is a decree or pro-

ceeding in another suit, or if it is filed in another record, or if it be an entry in any book, or paper, &c., which cannot reasonably be detained away from its proper place, then it should not be permanently taken from the record, book, &c., but after having been looked at by the Court and parties, and been made the subject of the requisite examination of witnesses, it should be marked and restored to its place; and an authenticated copy of it should be put upon the trial nathi as its substitute, bearing an endorsement indicative of the locality or place of custody of the original. It is most important that the trial nathi should contain, or be the record of, the *whole* of the evidence received at the trial, and no other material.

Practically this arrangement will effect a division of the materials which constitute the nathi, usually termed the (A) nathi, into two portions: *namely*, that which is actually used at the trial and that which is not. The two portions together will, however, still remain one nathi within the meaning of the High Court Circular Orders.

25. In suits, such as certain suits concerning mortgages, partnerships, matters of trust, &c., wherein it becomes necessary that accounts should be taken, and conditional decrees passed, the procedure of trial is somewhat prolonged, but not materially altered. For instance, if the suit be one brought to recover property, alleged to be mortgaged property in the possession of the mortgagee either upon the ground that the mortgage debt has been paid off by the usufruct or on the ground that whatever balance may remain due, the plaintiff is ready to pay it, the judicial officer has not merely to ascertain the facts, and consequent rights of the parties relative to the subject of the alleged mortgage, but also (in the event of the mortgage and the plaintiff's right to sue thereon being established) to determine the footing on which the account is to be taken, then the state of the account itself and lastly to pass such decretal order between the parties as is necessary to secure to each his right on the basis of the ascertained facts and accounts. As in all other cases, however, the questions raised between the parties relative to the existence and nature of the contract, the footing on which the account is to be taken, the state of the account, and so on, should be clearly stated as the issues in the suit, and the judicial officer should come to, and record in his judgment, a distinct finding on each of them. If on the state of the account arrived at, it appears that the mortgage debt, (or that which has to be treated as mortgage debt) and interest is

exactly paid off, the decree in favour of the plaintiff should be confined to a simple decree for delivery to him of the mortgaged property. If it appears also on the account that the mortgagee has, by the usufruct, or otherwise, been overpaid, then the decree may, in addition to ordering delivery of possession to the plaintiff, further order the mortgagee to pay the plaintiff the balance of account. If on the other hand, it should appear on the first account that the mortgage debt (or other principal money secured by the mortgaged property) and interest is not all paid off, the decree should declare the balance, which is found due on the account from the mortgagor to the mortgagee, and should also order that upon this amount (with specified interest thereon, if fitting) being paid by the plaintiff into Court within a certain reasonably short period limited for the purpose, the defendant should deliver possession of the property to him. And in suits of this kind the mortgagee, unless his conduct in the matter has been wrongful, should generally obtain his costs, even though the decree be in favour of the plaintiff.

It is a usual practice with the Courts of the Mofussil to dismiss a suit which has been brought by the mortgagor to recover possession of the mortgaged property on the allegation that the debt is discharged, in the event of its appearing at the trial that a single rupee is due to the mortgagee. This is productive of much unnecessary, and harassing litigation, and often leads in the end to a complete denial of equity to the mortgagor. The suit ought always to be treated as a suit for account, which the mortgagee is by the law bound to render; and the plaintiff is at least entitled to have the state of account ascertained, and declared. In most cases, moreover, the Court will promote justice and equity by passing such a decree as will render further litigation unnecessary.

26. When accounts have to be taken in the course of a suit, then it is incumbent on the accounting party, either at the time of filing his written statement, or at some other time before trial of this matter, to be fixed by the Court, to file an account. This account must be verified by the oath or affirmation of the accounting party, and each item on the credit side, *i. e.*, each item of disbursement on his part, must be proved by a voucher or sufficient evidence. And the opposing party has the right to meet this by evidence produced for the purpose of falsifying the account in any particular, or of adding new items to the debit side. The judicial officer should first take the evidence adduced in support of the account, through the before described processes of examination,

cross-examination, &c., then that adduced by the opposing party in the same manner; and should finally on consideration of the whole determine, as best he can, the true state of the account as against the accounting party. The matter of account should, in short, be treated as a separate subject of trial, in a certain sense independent of the rest of the suit. And it may even sometimes be convenient that the matter of account should be heard and determined at a time specially fixed for the purpose by an adjournment effected when the hearing of the principal issues between the parties, other than that of the account, has come to an end. And when this is so, a time may be appointed for filing the verified account (which is in effect a supplementary written statement) and a subsequent time for the filing of objections thereto by the opposing party. The final hearing of the matter of account should come on at a reasonable interval after this.

27. In some cases it becomes necessary for the purposes of the trial, even after the hearing has commenced, to send out a Commissioner or Amin to make, as it is commonly termed, a "local inquiry." When this is so, his duties should be limited by his purwanah to taking accounts, and depositions of witnesses, to inspecting the land or other subject of dispute, and to reporting to the Court either in the shape of a map, or in writing or both, the existing physical features of the subject inspected, its boundaries, and situation relative to other objects, and so on. The Court has no power to depute to him the determination of any issue between the parties. The functions of the Commissioner or Amin are limited to procuring evidence for the trial; and this evidence including the maps, reports, &c., of the Amin, must be adduced in open Court before the parties, and be subjected to objections, and testing according to the foregoing rules, like all other evidence.

28. When the trial in Court is over, the judicial officer should proceed at once, or as soon as possible, to the consideration of his judgment. It is essentially necessary that he should do so, while the demeanour of the witnesses, and their individual characteristics are fresh in his memory. He should bear in mind that his first duty is to arrive at a conscientious conclusion as to the true form of those facts of the case, about which the parties are not agreed, and that the only means to this end is afforded by the testimony of witnesses. Documents, generally speaking, are only valuable as being the utterances of, or representations made by, those who signed them, or gave them or assented to them; and they depend for their value upon the circumstances under which the persons to be

affected by their production, became parties to or concerned with them. All his can only be made known by oral testimony. Many documents, too, such as account books, jamabandi papers, khasras, and so on, are at the best contemporaneous memoranda of the transactions, which are entered in them, and have no force in favour of the party on whose side they are made, except so far as they corroborate the direct testimony of witnesses to those transactions, as, for instance, of the cashier to the payment or receipt of the money items in the account, of the patwari to the collections actually made by him according to the jamabandi, &c. Also in the relations between the disputing parties, the facts which constitute the immediate cause of action, *i. e.*, the occurrences which entitle and oblige the plaintiff to bring his suit, and those which immediately preceded them in the order of time, is usually to be found the clue to, and the best test of, the merits of the dispute. These can seldom be obtained otherwise than from the mouths of witnesses. It is, therefore, the duty of the judicial officer throughout the trial to keep a scrutinizing and attentive eye upon each witness as he is being examined, and above all to constantly remember that his chief business is to get at the facts through the witnesses. If he deliberately and intelligently directs his attention to this object, he will almost certainly succeed; and the principal facts being ascertained the right judgment is very rarely matter of doubt.

CONSOLIDATED REGULATIONS

OF THE SEVERAL

SOCIETIES OF LINCOLN'S INN, THE MIDDLE TEMPLE,
THE INNER TEMPLE, AND GRAY'S INN,

(HEREINAFTER DESCRIBED AS THE FOUR INNS OF COURT,)

AS TO

THE ADMISSION OF STUDENTS, THE MODE OF KEEPING TERMS,
THE CALLING OF STUDENTS TO THE BAR, THE GRANTING
CERTIFICATES TO PRACTISE UNDER THE BAR,

AND

LEGAL EDUCATION.

Admission of Students.

1. That every person, not otherwise disqualified, who shall have passed a PUBLIC EXAMINATION at any of the Universities within the Bri-

tish dominions, shall be entitled to be admitted as a Student to any Inn of Court, for the purpose of being called to the Bar, or of practising under the Bar, without passing a preliminary Examination ; but subject to Rule 7, hereinafter contained.

2. That every other person applying to be admitted as a Student to any Inn of Court, for the purpose of being called to the Bar, or of practising under the Bar, shall, before such admission, have satisfactorily passed an Examination in the following subjects, viz :—

- (a) The English Language,
- (b) The Latin Language, and
- (c) English History.

Provided that the Board of Examiners hereinafter mentioned shall have power to report any special circumstances to the Masters of the Bench of the Inn of which any person may desire to be admitted as a Student, for the purpose of being called to the Bar, or of practising under the Bar, and that the Masters of the Bench of such Inn shall have power to relax or dispense with this regulation, in whole or in part, in any case in which they may think the special circumstances so reported, or otherwise ascertained by the Bench, justify a departure from this regulation.

3. That such Examination shall be conducted by a joint Board, to be appointed by the four Inns of Court.

4. That for constituting such Board, each Inn shall appoint four Examiners, and the Council of Legal Education, hereinafter-mentioned, shall have power to allot such remuneration as they think fit to such Examiners.

5. That the Examiners shall attend according to a rota to be fixed by themselves, and that Two shall be a Quorum.

6. That Meetings of the Examiners of Students, applying for admission at any of the four Inns of Court, shall be held at least once in every week during each Legal Term, and once in the week next preceding each Legal Term, and at such other times as shall be appointed in accordance with any order of the Board of Examiners. Provided that no Examiner shall attend unless two clear days' notice prior to the day appointed for his attendance shall have been given to the Secretary of such Board, by at less one Candidate, of an intention to present himself on that day for Examination.

7. That no Attorney-at-Law, Solicitor, Writer to the Signet, or Writer of the Scotch Courts, Proctor, Notary Public, Clerk in Chancery, Parliamentary Agent, or Agent in any Court original or appellate,

Clerk to any Justice of the Peace, or person acting in any of these capacities, and no Clerk of or to any Barrister, Conveyancer, Special Pleader, Equity Draftsman, Attorney, Solicitor, Writer to the Signet, or Writer of the Scotch Courts, Proctor, Notary Public, Parliamentary Agent, or Agent in any Court original or appellate, Clerk in Chancery, Clerk of the Peace, Clerk to any Justice of the Peace, or of to any officer in any Court of Law or Equity, or person acting in the capacity of any such Clerk, shall be admitted as a Student at any Inn of Court for the purpose of being called to the Bar, or of practising under the Bar, until such person shall have entirely and *bonâ fide* ceased to act or practise in any of the capacities above-named or described; and if on the Rolls of any Court, shall have taken his name off the Rolls thereof.

8. That the following forms shall be adopted by the said Societies on application for admission as Students :—

I, _____ of
 aged _____, the _____ Son of
 _____, in the county of _____ (add father's
 profession, if any, and the condition in life and occupation, if any of the
 Applicant)
 do hereby declare that I am desirous of being admitted a Student of the
 Honourable Society of _____
 for the purpose of being called to the Bar, or of practising under the Bar,
 and that I will not, either directly or indirectly, apply for or take out any
 certificate to practise, directly or indirectly, as a Special Pleader or Con-
 veyancer or Draftsman in Equity, without the special permission of the
 Masters of the Bench of the said Society.

And I do hereby further declare that I am not an Attorney at Law,
 Solicitor, a Writer to the Signet, a Writer of the Scotch Courts, a Proctor,
 a Notary Public, a Clerk in Chancery, a Parliamentary Agent, an Agent
 in any Court original or appellate, a Clerk to any Justice of Peace, nor do
 I act, directly or indirectly, in any such capacity, or in the capacity of
 Clerk of or to any of the persons above-described, or as Clerk of or to any
 Barrister, Conveyancer, Special Pleader, or Equity Draftsman, or of, or to
 any Court of Law or Equity.

Dated this _____

day of _____

(Signature)

shall have been present at the grace before dinner, during the whole of dinner, and until the concluding grace shall have been said.

*Calling to the Bar.**

13. That every Student of the said Societies shall have attained the age of Twenty-one years before being called to the Bar.

14. That every Student of the said Societies shall have kept Twelve Terms before being called to the Bar, unless any Terms shall have been dispensed with under the 47th Rule, hereinafter-mentioned, or, as to Students from India or the Colonies, under the 19th Rule, hereinafter-mentioned.

15. That no Student shall be eligible to be called to the Bar who shall not have attended during one whole year the Lectures and Private

* In addition to the formal requirement of eating dinners, an ordinary Student for the Bar (*i. e.*, one who wishes to be called in twelve terms,) must qualify in one of the three ways specified in Rule 15 : he must either (1.) have attended during a whole year, the Lectures and Private Classes of two of the Readers ; or (2.) have been a pupil in Chambers for one year, for which he has to pay 100 Guineas ; or (3.) have passed a General Examination. It is however essential for Students from India who wish to be called in eight terms, that they should pass the General Examination and at the same time the special one in Hindoo and Mahomedan Law, and the Laws in force in British India. Even then a dispensation of four terms is granted (at least by the Society of Lincoln's Inn), only on condition of the applicant undertaking to return to and to fix his residence in India, and to leave England for that purpose before the first day of the next ensuing Term.

The forms and ceremonies connected with a call to the Bar, are not very imposing. A petition for call has to be previously signed, and then presented to the Treasurer at the Benchers' table after dinner, about four days previously to the date fixed for call ; a memorandum from a Benchet of the Inn undertaking to move the call, being left at the Steward's office previously to the presentation of the petition for call. The call is then ordered to take place on the fixed day of the term, and it takes place by what is called " Publication in Hall." Half an hour before the dinner time, the Students to be called are ranged in the order of their call. The Treasurer and some of the Benchers then come and take their seats in the Hall, and to each Student as he comes up in order, the Treasurer says, " By the authority and on behalf of the Masters of the Bench, I publish you a Barrister of this Society," and then shakes him by the hand. The ceremonies so far as the Inn is concerned, are completed by attendance at dessert with some of the Benchers, when three toasts are drunk ; the Queen, the Honorable Society, and the Barristers called that day ; but it is supposed to be advisable to enter one's name the next morning in the record of the Bail Court if sitting, otherwise in the Court of Queen's Bench. It rather detracts from the dignity of this proceeding, that it has to be performed in a narrow passage, amid a struggling crowd and in close proximity to the lady who keeps an orange and gingerbread stall.

Classes of two of the Readers, or have been a Pupil during one whole year, or periods equal to one whole year in the Chambers of some Barrister, Certified Special Pleader, Conveyancer, or Draftsman in Equity, or two or more of such persons, or have satisfactorily passed a General Examination. Provided that Students admitted before the first day of Hilary Term, 1864, shall have the option of qualifying themselves to be called to the Bar, either under the Rules of the Inns of Court of Hilary Term, 1852, or under these Regulations.

The fees payable at Lincoln's Inn are as follows :

	£.	s.	d.
On application for form of admission. (<i>Rule 9</i>)	1	1	0
On admission. (<i>Rule 37</i>)	5	5	0
This payment entitles the Student to attend the lectures of all the Readers, not only while he is a Student, but also, if so inclined, when he is a Barrister.			
Fine on admission	5	12	6
Stamp on such admission	25	2	6
Yearly dues for eating commons &c. for two years, at £ 6-13 4 each year.....	13	6	8
Fine on call.....	11	5	0
Do. for the Library	20	10	0
Stamps in register and on bond	50	5	0
<hr/>			
Total £.	132	7	8

The above are the absolutely necessary expenses at Lincoln's Inn.

Every student, who is not a member of one of the Universities specified in Rule 10, has at the time of admission to deposit £. 100-0 0 as security : for this the Society allows no interest. The amount is returned on call to the Bar, on leaving the Society without being called, or, in the event of death, to the depositor's personal representative. Practically however, the greater part of the £. 100 is absorbed in paying the necessary fees and stamps on call.

Attendance at the private class of any of the five Readers in English Law involves a payment of £. 5-5-0 per annum, for which payment however, the classes of all the five Readers may be attended. £. 1-1-0 per annum is payable for attendance at the private class of the Reader on Hindoo and Mahomedan Law and the Laws in force in British India, (*Rule 38*)

The sum of £. 15-10-0 may be paid on call as a composition for the ordinary dues, which amount to £. 2-0-0 or £. 3-0-0 a year. It is as well to compound, to avoid the trouble of the small annual payment, and the necessity which such annual payments entail, of providing two householders as sureties.

Further, a certificate of admission and call to the Bar, which is documentary proof of standing as a Barrister, costs £. 1-16-0.

For the yearly dues of £. 6-13-4, a Student if so disposed can eat fourteen dinners each term in Hall, the dues being the same for fourteen dinners as for three. The dinners are good substantial ones without much variety ; fair beer ad libitum, and a bottle of wine to each mess of four. The dinner hour at Lincoln's Inn is at half past five.

15. That no Student of any of the said Societies, desirous of being called to the Bar, shall be so-called, until the name and description of such Student shall have been placed upon the Screens hung in the Hall, Benchers' Room, and Treasury or Steward's Office, of the Society of which he is a Student, fourteen days in Term before such call.

17. That the name and description of every such Student shall be sent to the other Inns of Court, and shall also be screened for the same space of time in their respective Halls, Benchers' Rooms, and Treasury or Stewards' Offices.

18. That no call to the Bar shall take place except during Term ; and that such call shall be made on the same day by the several Societies, namely, on the Sixteenth day of each Term, unless such day shall happen to be Sunday, and in such case on the Monday after.

19. That not more than four Terms under any circumstances be dispensed with in favour of Students coming from India, or the Colonies, with a view to return to Residence there, and that it is not expedient to dispense with any Terms for such Students except on the following conditions, *viz* :—

1. That Students from India do satisfactorily pass an Examination in Hindu and Mahomedan Law, the Indian Penal Code, the Code of Criminal Procedure, the Code of Civil Procedure, the Indian Succession Act, and in such other Codes and Acts as may from time to time become Law in British India ; and, in addition to such Examination, do pass such Examinations, and abide by all such Rules and Regulations as are now in force for Students seeking a Pass Certificate, by Examination, for Call to the Bar.
2. That Students from the Colonies do pass such an Examination as is required, and do abide by all such Rules and Regulations as are now in force, in order to obtain a Certificate of Honour.
3. Provided that each of the four Inns of Court be at liberty to dispense with the above Conditions in such very special circumstances as they may think fit, and that such circumstances be stated in the Certificate of Call to the Bar given to every such Student. The Benchers of each Inn, subject to the foregoing limitations, being guided, in the dispensation of Terms, by the circumstances of each particular case.

Certificates to practise under the Bar.

20. That no Student of any of the said Societies shall be allowed to apply for or take out any Certificate to practise, either directly

or indirectly, as a Special Pleader, or Conveyancer, or Draftsman in Equity, without the special permission of the Masters of the Bench of the Society of which he is a Student, to be given by order of such Masters, and that no such permission shall be granted until the Student applying shall have kept twelve terms.

21. That such permission shall be granted for one year only from the date thereof, but may be renewed annually by order, as ^{is} aforesaid.

22. That no Student shall be allowed to obtain any such Certificate unless he shall have attended such Lectures and Classes, or passed such an Examination, or been such Pupil, as under the Rules herein contained would be necessary to entitle him to be called to the Bar. Provided that Students admitted before the first day of Hilary Term, 1864, shall have the option of qualifying themselves to obtain such certificates, either under the Rules of the Inns of Court of Hilary Term, 1852, or under these Regulations.

23. That the regulations herein contained as to screening names in the Halls, Benchers' Rooms, and Treasury or Stewards' Offices, shall apply to Students seeking Certificates to practise as Special Pleaders, Conveyancers, or Equity Draftsmen.

Council of Legal Education.

24. That a standing Council shall be established, to be called "The Council of Legal Education," and to consist of eight Benchers, two to be nominated by each of the Inns of Court and of whom four shall be a quorum. That the Members of such Council shall remain in office for two years, and that each Inn shall have power to fill up any vacancy that may occur in the number of its nominees during that period. That to this Council shall be entrusted the power and duty of superintending the whole subject of the Education of the Students, and of arranging and settling the details of the several measures which may be deemed necessary to be adopted, and such other matters as herein in that behalf mentioned.

25. That the Council of Legal Education shall have power to grant dispensation to Students, who shall have been prevented by any reasonable cause from complying with all the regulations as to the attendance on Lectures and Classes which shall from time to time be established.

26. That all arrangements touching the number of public lectures to be delivered by the Readers, and the hours and extent of private classes, shall be left to the Council.

Educational Terms.

27. That for the purposes of Education the legal year shall be considered as divided into three Terms, one commencing on the 1st of November and ending on the 22nd of December, the second commencing on the 11th of January and ending on the 30th of March, and the third commencing on the 5th of April and ending on the 31st of July, subject to a deduction of the days intervening between the end of Easter and the beginning of Trinity Term.

Readers.

28. That for the purpose of affording to Students the means of obtaining instruction and guidance in their legal studies, six Readers shall be appointed, *viz.* :—

1. A Reader on Jurisprudence and Civil and International Law, to be named by the Society of the Middle Temple.
2. A Reader on the Law of Real Property, to be named by the Society of Gray's Inn.
3. A Reader on the Common Law, to be named by the Society of the Inner Temple.
4. A Reader on Equity, to be named by the Society of Lincoln's Inn; and
5. A Reader on Constitutional Law and Legal History, to be named by the Council of Legal Education.
6. A Reader on Hindu and Mahomedan Law, and on the Laws in force in British India, to be named by the Council of Legal Education.

29. That the Readers shall be appointed for a period of three years.

30. That the duties of the Readers (subject to regulation by the Council of Legal Education) shall consist of the delivery of two courses of Lectures in each Educational Term; of the formation of Classes of Students, for the purpose of giving instruction in a more detailed and personal form than can be supplied by general Lectures; and of affording to Students, generally, advice and directions for the conduct of their professional studies.

31. That a separate course of Lectures on International Law shall be delivered, and for the present by the Reader on Jurisprudence, Civil and International Law.

32. That it shall be part of the duty of the Reader on the Com-

mon Law to give instruction in his Lectures on the subject of the office and duties of Magistrates.

33. That the Readers on Common Law and on Equity shall have particular regard to the Law of Evidence in their Lectures and other instruction to the Students.

34 That (subject to regulation by the Council of Legal Education) one of the Courses of Lectures to be delivered by the Reader on Common Law, the Reader on Equity, and the Reader on Real Property, shall be on the elementary, and the other on the more advanced, portion to which his Lectures apply.

Emoluments of Readers.

35. That each Reader shall receive the fixed sum of four hundred Guineas a year, except the Reader on Hindu and Mahomedan Law, and on the Laws in force in British India, which Reader shall receive the fixed sum of three hundred Guineas a year.

36. That at the end of each year the Fees to be paid by Students for the privilege of attending Private Classes (except the Private Class of the Reader on Hindu and Mahomedan Law, and on the Laws in force in British India) shall be distributed amongst the Readers (except the last-mentioned Reader) in proportion to the number of Students attending their respective Private Classes. And the fees to be paid by Students for the privilege of attending the Private Class of the Reader on Hindu and Mahomedan Law, and the Laws in force in British India, shall be paid to that Reader.

Fees Payable by Students.

37. That each Student shall, on admission, pay a sum of five Guineas, which shall entitle him to attend the Lectures of all the Readers.

38. That each Student shall be privileged to attend all the Private Classes (except the Private Class of the Reader on Hindu and Mahomedan Law, and the Laws in force in British India) on payment of Five Guineas per annum, and each Student shall also be privileged to attend the Private Class of the last-mentioned Reader on payment of One Guinea per annum.

Examinations on Subjects of Lectures.

39 That in the month of July, in each year, there shall be Voluntary Examinations of the Students upon the subjects of the several

Courses of Lectures, but no Student shall be entitled to go in for Examination on any of the subjects, unless he shall have obtained a Certificate from the Reader that he has duly attended his Lectures and Classes upon the subject on which he offers himself for Examination. Each Examination shall be conducted by some Barristers or Barrister (not being the Reader of the Class to be examined) to be nominated for that purpose by the Council of Legal Education, and the Council of Legal Education shall have power to allot such remuneration as they shall think fit to such Examiners.

40. That no Student who shall be entitled to a Certificate of having attended the advanced Course of Lectures of the Reader on Common Law, on Equity, or on the Law of Real Property, shall be at liberty to go in for Examination upon the subject of the Elementary Course of Lectures on the same head; and that no Student shall be admitted for Examination on the subject of the Elementary Course of Lectures, on any of the last-mentioned heads, after he shall have kept more than eight Terms, or for Examination on any of the subjects, after he shall have kept all his Terms, unless in either case the Council of Legal Education shall for special reasons think fit to allow the same.

41. That as an inducement to Students to attend and make themselves proficient in the subjects of the Lectures, Exhibitions of the respective values hereinafter mentioned shall be founded and be conferred on the most distinguished Students at the Examinations in July.

42. That five of such Exhibitions shall be given to Members of the advanced Classes in the Common Law, in the Law of Real Property, and in Equity, and the most proficient among the Students in Jurisprudence, the Civil Law, and International Law, and the Students in Constitutional Law and Legal History, every year, and be Thirty Guineas a year, to endure for two years, making ten running at one time.

43. That three of such Exhibitions shall be given to Members of the Elementary Classes in the Common Law, in the Law of Real Property, and in Equity, and be twenty Guineas a year, to endure for two years, making six running at the same time; but to merge on the acquisition of a superior Studentship.

44. That all the Students attending the Lectures of any of the Readers shall be at liberty to attend the several Oral Examinations; and that all Members of the Inns of Court, who shall have obtained written Orders of Admission from any of the Readers, or from any Bench-

er of any of the Societies, shall also be at liberty to attend such Examinations.

General Examinations.

45. That General Examinations shall be held twice a year, for the Examination of all such Students as shall be desirous of being Examined previously to being called to the Bar, and such Examinations shall be conducted by at least two Members of the Council, jointly with the six Readers, and Certificates of having satisfactorily passed such Examination shall be given to such Students as shall appear to the Examiners to be entitled thereto.

46. That such Examinations shall be held in or shortly before Michaelmas Term, and in or shortly before Trinity Term.

47. That as an inducement of Students to propose themselves for such Examination, Studentships and Exhibitions shall be founded, of Fifty Guineas per annum each and Twenty-five Guineas per annum each respectively, to continue for a period of three years, and one such Studentship shall be conferred on the most distinguished Student at each General Examination, and one such Exhibition shall be conferred on the Student who obtains the second position; and further, the Examiners shall select and certify the names of three other Students who shall have passed the next best Examinations, and the Inns of Court to which such Students as aforesaid belong may, if desired, dispense with any terms, not exceeding two, that may remain to be kept by such Students previously to their being called to the Bar. Provided that the Examiners shall not be obliged to confer or grant any Studentship, Exhibition, or Certificate, unless they shall be of opinion that the Examination of the Students has been such as entitles them thereto.

48. That at every call to the Bar, those Students who have passed a General Examination, and either obtained a Studentship, an Exhibition at such Examination, or a Certificate of Honour, shall take rank in seniority over all other Students who shall be called on the same day.

Common Fund.

49. That the four Inns of Court shall form a Common Fund by annual contributions, the amounts of which shall be mutually agreed on; and out of which Fund shall be drawn the Stipends to be assigned to the Readers, the Remuneration to Examiners, and such Studentships and Exhibitions as shall from time to time be conferred upon Students,

and such necessary Expenses as shall be incurred by the Council of Legal Education.

50. That the Fees of Five Guineas paid by Students on admission shall form part of the Common Fund.

The above Regulations were sanctioned and confirmed by orders of the several Societies, made in the year 1863, and subsequently.

CALCUTTA HIGH COURT.

The 31st July, 1867.

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Right of Way—User—Magistrate's Order.

GOOROO CHURN GOON* and others, (Defendants) *Appellants,*

versus

GUNGA GOBIND CHUTTOPADHYA, (Plaintiff) *Respondent.*

The fact of an owner of a patch of waste land having allowed a neighbour's cattle to stray over it can give no right of user in the land.

We see no reason to interfere with the Principal Sudder Ameen's order in this case. The plaintiff apparently owns a piece of land between a public road and the village, over which the cattle of his neighbour, and occasionally men, have been accustomed to make short cuts to their own quarters. The land remained for some time uncultivated, but the owner now wishes to put it under crop, and sued to have the Magistrate's order, requiring the passage to be thrown open, reversed. The first Court dismissed the suit, but the Judge, on appeal, decreed the claim. There is a preliminary objection taken by the special appellant, that no suit lay against such an order under Section 311 of the Code of Criminal Procedure; but that and the other Sections of Chapter 20 of the Code refer to public thoroughfares; and it is quite clear from the words of the Magistrate's order that he did not treat this as a public road, but as a private one, over which a right of way had been established.

For the rest the Judge has found as a fact, on evidence, that although cows have been accustomed to stray over the land, and also at times men and women, there has been no continuous and ancient user of the land by the public as would entitle it to be considered a common or public roadway; nor can it, we conceive, be contended, that because an own-

* 4, Wymar's Reporter, Civil Rulings, p. 133.

er of a patch of waste land, situated as this is, allows his neighbour's cows to stray over it on their way to pasture, that he thereby creates in them or in their owners a right of easement over the land, the practical effect of which is to deprive it of all value by rendering its cultivation impossible.

We reject the special appeal with costs.

CALCUTTA HIGH COURT.

The 10th August, 1871.

The Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Prescription—Grounds—Limitation.

RAJAH BEJOY KESHUB ROY,* (Defendant) *Appellant,*

versus

OBHOY CHURN GHOSE, (Plaintiff) *Respondent.*

The length of time required in a case of prescription prior to 1st July 1871 was at least 12 years.

The "Limitation Act, 1871," requires peaceable and open enjoyment without interruption for 20 years.

The right asserted in a claim founded on prescription should be strictly and clearly defined, and cannot be based on rights which are inconsistent. When a party is called upon by the Court to elect which branch of a double case he will proceed with, the election must be distinct and clear, and such as will bind him and will show accurately on the face of the record the claim (if any) which is abandoned.

MACPHERSON, J.—In my opinion, the decree of the Subordinate Judge is wrong.

The Subordinate Judge states in his judgment that the suit is brought to establish a right by prescription to hold what he calls a "floating hât," a hât held partly on land and partly on water, near the mouth of a certain *khal* which runs into the Hooghly. And he finds it proved that the plaintiff has held such a hât "for a good many years," and has levied tolls from the boatmen and others frequenting it, "under a privilege which in the legal sense of it amounts to prescription."

But a finding of this sort, that a man has done certain acts, or made use of his neighbour's property in a certain way "for a good many years," is quite insufficient as a basis of a declaration that the man has acquired by prescription a right to do those acts or to make that use of his neighbour's property. There must be a distinct finding that it is proved that the person claiming the right by prescription has, for a certain

* *Vide* 16, W. R., p. 198.

length of time, uninterruptedly exercised either himself or by those through whom he claims the right which he sets up. The length of time requisite under the law in force when this suit was instituted was, in my opinion, at the least 12 years. And according to the new "Limitation Act, 1871," which, as regards this class of questions, came into operation on the 1st of July last, peaceable and open enjoyment by the person claiming the right, without interruption and for twenty years, must be proved (See Act IX. of 1871, Section 27).

Moreover, the right asserted must be strictly and clearly defined : whereas in the present case the right asserted by plaintiff and established by the decree of the Subordinate Judge is described in the vaguest and most ill-defined manner.

But the whole suit has been wrongly and improperly brought. The Moonsiff was properly justified in the remarks which he made on the mode in which the plaint is framed, and I think he would have done well to have refused to receive it on his file at all.

The plaintiff chose to come into Court with a case which was in itself double and inconsistent, alleging, *firstly*, his proprietary right in the bank of the khal on and opposite to which the hât is held ; and *secondly*, his right by prescription to hold the hât there. The defendant claims the site where the hât is held as his property, and denies that the plaintiff has any right by prescription or otherwise to hold the hât there. Thereupon, the plaintiff, not in truth expressly relinquishing or abandoning his claims as proprietor, was allowed in the lower Courts to omit (as it were) going into that part of his case, and to go to trial on a naked ill-defined issue as to whether he has been in the habit for many years of holding this hât at this place.

If the plaintiff had put upon record a formal and complete abandonment of all claim as proprietor to the site on which the hât is alleged to be held, and if he had accurately defined and had detailed the limits of the right which he sought by prescription to establish over another man's property, he might properly have been allowed to go to trial on the question as to prescription. But he ought not to have been allowed to proceed at all so long as every thing was left undefined and uncertain, and so long as there was nothing more than a *quasi* relinquishment of the claim of proprietary right.

It is quite clear to me from the proceedings in the lower Court, and from the manner in which the case was conducted for the respondent before us, that at this moment the plaintiff asserts, and has no intention of

ceasing to assert, *title* as proprietor to the site of this hāt. If he is really proprietor, he may be entitled to a decree as such, but he certainly cannot be entitled to a decree declaring a right by prescription. The two rights are wholly inconsistent.

Parties are not entitled to come into Court and ask for assistance until they have made up their minds in some decree as to what their position is and as to the assistance for which they have a right to ask. And if a plaintiff coming into Court with a vague double case is called upon by the Court to elect which branch of his case he will proceed with, the election must be distinct and clear and such as will bind the party electing and will show accurately on the face of the record the claim (if any) which is abandoned.

On the whole, I have no doubt that the decree of the Lower Appellate Court should be set aside, and that the plaintiff's suit ought to be dismissed with costs in all the Courts.

CALCUTTA HIGH COURT.

The 27th November, 1871.

The Hon'ble H. V. Bayly and G. C. Paul, *Judges.*

Easement—Right of way—User.

RAM GUNGA DOSS,* (Plaintiff) *Appellant,*

versus

GOBIND CHUNDER DOSS and others, (Defendants) *Respondents.*

A right of way need not have its origin in an express grant, but may be established by continued user for a certain period constituting adverse possession.

PAUL, J.—In this case the plaintiff sued to have his right of way established over plots 4, 3, 2, and 1, leading from the house of the plaintiff to a road on the east of the house of the defendant. His complaint was that some portion of the pathway over plot 1 was completely obstructed by the defendant and some portion of the pathway over plots 3 and 4 narrowed.

The judgment of the first Court was in these words:—"As regards the first issue it is to be observed that the pathway over the disputed kitta 1st is in fact the pathway leading to the other pathway and the pond, the east of the defendant's house, and it has been proved by the evidence of the *respectable witnesses on both sides* that there was a pathway since a long time running from the western end of the above-mentioned pathway in a southward direction and then joining with the disputed kitta

* *Vide* 16, W. R., p. 281.

3rd runs southward through kitta 4th, and then turns westward and proceeding to the house of Sudanund Surma and of the plaintiff and from thence to the roads on the north and south of place on the east of the defendant's house, &c." The above quotation from the judgment proves that many years—upwards of twelve years—ago the present plaintiff had a house to the east of the present defendant's house, and that he was for a long time in the habit of walking over and using the pathway in his visits to Sudanund Surma and otherwise. It further appears that not only the plaintiff but other persons made use of this path, and under the circumstances so stated a clear right of user has been established by the plaintiff over the land subject to a small modification which will be hereafter noticed.

The Judge in appeal held that the Moonsiff was wrong, and in the 3rd para. of his judgment the Judge observes :—"The plaintiff's allegation is that for more than 12 years he had passed to and fro along this path which had been in existence, 'for a long time' . By what right he had passed to and fro he does not exactly state, but his pleader in reply to my question on this point stated that the path was a public thoroughfare, and that therefore his client had a right of way over it." It is quite clear that the basis of the whole of the judgment is altogether a mistake. The facts stated, *viz.*, that the plaintiff had passed to and fro along the path for upwards of 12 years is quite sufficient to support the right he claimed. But the Judge asks by what right he passed to and fro the path? The Judge seems to entertain an idea that a right of way should have its origin in an express grant made in favor of the party claiming the right. A grant, no doubt, is one of the modes in which a right of way may be established, but a continued user for a certain period of time which would constitute adverse possession in an ordinary suit might also be, and is often deemed, sufficient to establish a right of way. Following out the view last-mentioned, the Judge says in describing the evidence of the first witness :—"The first witness for the plaintiff, Sama Churn, a vakeel, says that defendant's brother 10 or 11 years ago made the road for the convenience of the priest and that the villagers by private arrangement would go along it up to defendant's yards and then east over plot first to the road on the east of defendant's Baree. Now this shows, *first*, that it was a private road, and *secondly*, that villagers went by permission." Now, whether the road was private or not is not very material; at least it was not so private as to prevent access to it by passers. Then it is said that villagers went by permission. What that

permission was does not appear unless it be the private arrangement referred to above, and what that private arrangement was is not at all stated in the record. Upon the whole, it is clear that the plaintiff did not go by any express permission, but by a right acquired by being allowed to pass over the road for a great number of years without objection, and it can hardly be contended that rights are not often acquired in that way by a party being permitted to pass without obstruction and without objection. In conclusion the Judge says :—" If, as I believe, the defendant has permitted the villagers including plaintiff to go over his road since he made it in 1265, they have acquired no right to do so ; and the defendant may close it entirely, I mean all four plots, if he pleases." As we have previously observed, no special permission is pleaded in this case, and if there were any such, it amounted merely to the want of objection. The Judge reverses the decision of the Moonsiff on reading the evidence of the plaintiff's witnesses, but it is quite clear that he has misconstrued that evidence because the plaintiff's witnesses prove the existence of the pathway leading on to the plaintiff's house for a great length of time. The first Court on this point says that the witnesses of the plaintiff and the defendant pretty well agree. That has been clearly shewn to be the case by Baboo Kalee Mohun Doss, and Baboo Grish Chunder Ghose very candidly admits that Baboo Kalee Mohun Doss's construction on this point is correct. The case seems to be one-sided. The witnesses on both sides prove the plaintiff's claim. Such being the case, it is useless to remand it to the Lower Appellate Court. As both parties really contested the right of way from the plaintiff's house to the road on the east of defendant's house, there is no reason why the litigation should be prolonged. The interests of justice require that the case should be determined here. The Moonsiff decreed the plaintiff's right of way over plots 4, 3 and 1, but dismissed his claim as to the intervening link plot 2. It is quite clear that unless some path be allowed to the plaintiff leading from plot 1 to 3, the decree would be quite useless to him. The Amcen has found that there was a pathway (ক) leading from plot 3 to 1 and a waste piece of high-land (পতিত উচ্চ স্থান) up to the public road. In accordance with that finding, we think the decree of the Lower Appellate Court should be reversed and that of the first Court restored with this modification, viz., that in passing from his house the plaintiff is declared entitled to pass over plots 4, 3, ক and 1 and over high-land up to the road running from north to south.

The appeal is decreed with costs of all the Courts.

As the Moonsiff gave a decree which left it to the option of the defendant to give the plaintiff a new pathway on the north of kitta 1st and it is not shewn that he has done that, we declare the plaintiff's right to pathway over plot 1.

CALCUTTA HIGH COURT.

The 23rd November, 1871.

The Hon'ble H. V. Bayley and G. C. Paul, Judges.

Easement—User—Obstruction—Joint Hindoo Family.

CHUNDER KANT CHOWDHRY* and others, (Defendants) *Appellants*,

versus

NUND LALL CHOWDHRY and others, (Plaintiffs) *Respondents*.

Suit by members of a joint family to enforce their right to a pathway through a door (which had been blocked up) leading to a joint Thakoorbaree. *Held* that this was not a case in which the plaintiffs claimed the right of user, but only complained of the obstruction of a passage belonging to them jointly with the defendants.

PAUL, J.—This is a very simple case. The facts are shortly these :—The plaintiffs alleged in their plaint that a certain pathway leading from their family-dwelling-house to a certain Thakoorbaree belonging to them had been obstructed by the defendants having bricked up the passage through a door. The plaint showed that this obstruction took place in 1272, and the present action was brought in 1276, that is, after the lapse of four years.

Upon this state of facts, it became necessary to enquire whether the matters stated in the plaint were true or not, as the cause of action admittedly had arisen within the period of limitation.

The defendants set up various pleas amounting to acquiescence on the part of the plaintiffs and their abandonment of the right of way. The other defences were also of a similar character.

The first Court found that the obstruction took place in 1267 and proceeding on that finding, held that the plaintiffs' rights were barred by acquiescence.

The Appellate Court differed from the first Court upon the question as to when the obstruction first took place, and held that it did not take place in 1267, but in 1272, and found that whether it took place in 1267 or in 1272, the cause of action arose within the period of limitation and there was no acquiescence or abandonment of right by the plaintiffs

* Vide 16, W. R., p. 277.

either in law or in fact. Having overruled this preliminary objection, the Appellate Court, in a lengthy and apparently duly considered judgment, came to the conclusion that all the facts on which the plaintiffs relied were true, *viz.*, that the Thakoorbaree was the joint property of the plaintiffs and the defendants, that the pathway was also their joint property, both having come into existence many years ago at the time of their ancestors, and that the obstruction caused by the defendants was a clear infraction of the undoubted rights of the plaintiffs. The Lower Appellate Court accordingly decreed the plaintiffs' suit.

It appears that, on a former occasion, a suit was instituted by one of these plaintiffs against these defendants in respect of some interest in the Thakoorbaree, the pathway, the door which was blocked up, a bungalow, and an adjacent wall. In that suit a somewhat confused and unintelligible decision was pronounced to the effect that the plaintiff had a joint interest in the Thakoorbaree and the ground on which the door was erected, but not in the door or the wall adjoining the ground. Consequently, the plaintiff's suit was partly decreed and partly dismissed.

The Judge of the Lower Appellate Court seems to have considered that the plaintiff in that suit had wholly succeeded in obtaining the relief he sought, and in thinking so he doubtless put a wrong construction on the decree which was pronounced in that case, but that wrong construction was only as to a part, *viz.*, that part of the decree which provided that the *durwaja* belonged to the defendants.*

Baboo Mohinee Mohun Roy for the defendant, appellant, contends that this wrong construction has prejudiced his clients' case, completely obscuring the intellect of the Judge below and drawing him to a conclusion of fact at which he would never have arrived but for this wrong construction. Beyond admitting the fact that there was a construction put by the Lower Appellate Court as to a part of the decree, we cannot follow the learned pleader to the extent to which he carries his argument. We find the Lower Appellate Court has duly considered all the oral evidence in the case, apart from any opinion which he may have formed upon the construction of the decree, and has come to a clear and deliberate conclusion on the facts stated by the plaintiffs. The case, therefore, is one in which the plaintiffs, as members of a joint family, seek to enforce their right to a pathway through a door (which has been blocked up) leading to a joint Thakoorbaree; and to an unbiassed mind no clearer case could well be conceived.

It has, however, been contended by Baboo Mohinee Mohun Roy that the judgment of the first Court was right, which proceeded on the plea of acquiescence on the part of the plaintiffs as set up by the defendant. But non-user of a pathway, either for nine years as stated by the defendants, or for four years as admitted by the plaintiffs, does not necessarily constitute an abandonment of any right which the plaintiffs may have possessed. Several cases have been cited in support of the position taken up by the first Court. Speaking for myself, I must say that if it were necessary to decide this case on the strength of the cases cited, I should have been disposed to refer the matter to a Full Bench. The cases cited are reported in Weekly Reporter, Volume XV., pages 295, 402, and Weekly Reporter, Volume XIV., page 79. It appears to me, however, that these cases refer to a different state of facts with a different class of rights. They relate to a case in which one man acquires by reason of uninterrupted user a right over another man's land; and it may well be that in some instances, from a long disuse of a certain right, abandonment thereof may be inferred; but I am far from thinking that mere disuse of a certain right for 4 or 5 years is sufficient to constitute an abandonment of that right. The plaintiffs' case here is distinguishable. The plaintiffs do not claim a right of user. They complain of the obstruction of a passage which belongs to them jointly with the defendants. The analogy therefore altogether fails, and this case, which I at first stated was a very simple case, became somewhat complicated by the fact of the Judge of the first Court having allowed his mind to wander into irrelevant matters which have no existence in this particular case.

The special appeal is dismissed with costs.

CALCUTTA HIGH COURT.

The 30th November, 1871.

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Right of Way—User.

FUTTEH ALI,* (one of the Defendants) *Appellant,*

versus

ASGUR ALI and another, (Plaintiffs) *Respondents.*

To constitute a right of way, there must have been an uninterrupted user as of right, and not one exercised at the mere will and favor of the other party.

GLOVER, J.—This was a suit for a declaration of plaintiff's right of way over a waste piece of land belonging to defendant, and for an order

* Vide 17, W. R., p. 11.

to pull down a house which defendant had erected across the pathway. The defence was that the path was not a public road, and that there was no right of way to the plaintiffs.

The first Court found that there was no right of way over this land, but that plaintiff along with other villagers used to pass over the land to the public road by consent of the defendants. The Judge, however, although he found that so much of the plaintiffs' statement that the road was used for marriage and burial processions was false, still considered that the plaintiffs' suit should not be altogether dismissed, because the plaintiffs had actually been in the habit of using the path as a means of proceeding directly to the high road. At the same time, the Judge appears to admit the existence of another way by which processions and cattle, &c., were wont to pass.

It appears to us that the Judge's decision is not maintainable. It is admitted that the waste land, through which the path in dispute runs, is the defendant's land; and there is nothing whatever to disprove the allegation of the defendant, that plaintiff used the land for some years by his sufferance and permission. To constitute a right of way, there must have been an uninterrupted user as of right, and not one exercised at the mere will and favor of the other party.

In this case, it is clear from the finding of the Lower Appellate Court that the plaintiff has another way to the public road when going with cattle, procession, &c., but that he has been in the habit of making use of this pathway by the sufferance of the defendant. This creates no right of way.

The Judge's decision is therefore reversed with costs.

CALCUTTA HIGH COURT.

The 4th January, 1872.

The Hon'ble G. Loch and W. Ainslie, Judges.

Right of Way—Section 15 of Act XIV. of 1859.

HARO DYAL BOSE,* *Petitioner,*

versus

KRISTO GOBIND SEIN, *Opposite party.*

Section 15, Act XIV. of 1859 is not applicable to a suit to enforce a mere right of way.

LOCH, J.—We think that this rule must be made absolute and the order of the Moonsiff set aside. The opposite party has been served with notice, but he has failed to attend. The suit was one to enforce a right

* *Vide*, 17, W. R., p. 70.

of way, and it was brought under the provisions of Section 15, Act XIV. of 1859, and the plaintiff obtained a decree. It appears to us that the provisions of that Section are not applicable to a suit of this kind. That Section contemplates the recovery of possession of lands or other immoveable property of which the plaintiff has been deprived by an act of the defendant: it does not contemplate the recovery of a mere right, a right which may be shared by a hundred other people, but it contemplates the recovery of actual possession of the immoveable property in suit: a mere declaration made by a Court that the plaintiff has a right of way and that the obstruction is to be removed is not the giving of possession to the plaintiff as is contemplated by the terms of that Section.

We think, therefore, the order of the Moonsiff must be set aside, and the petitioner will recover costs.

CALCUTTA HIGH COURT.

The 25th April, 1872.

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Right of Privacy—Opening a Door in one's Property (to annoyance of another.)

KALEE PERSHAD SHAHA,* (Plaintiff) *Appellant,*

versus

RAM PERSHAD SHAHA, (Defendant) *Respondent.*

In this case the defendant was held entitled to make a door in his own property, notwithstanding that it was proved to interfere with the privacy of the female members of the plaintiff's family, and to have been otherwise a source of annoyance to him; the right of privacy not being an inherent right of property, but requiring to be proved by local usage, permission, or grant.

Considering however the evidence of ill-will and malice which actuated the defendant in making the door, he was not allowed his costs.

GLOVER, J.—This was a suit by one brother against another to have a door which has been opened by the defendant in a wall, separating the premises of the two brothers, closed, on the ground that by it the privacy of the plaintiff's family is interfered with, as it opens into the private court-yard of the plaintiff's house, where the female members of his family cook, draw water from the well, and bathe. There is also a further prayer to the effect that the defendant may be restrained from passing through this door into the plaintiff's court-yard.

* *Vide* 18, W. R., p. 14.

The defence set up was that the door was an old door which had been in existence for a period of more than 12 years, and that the plaintiff's suit was therefore barred by limitation. On the merits defendant alleged that no injury was caused by the opening of the door, and that the defendant had on several occasions passed through it into the court-yard of the plaintiff, with the plaintiff's consent.

The Moonsiff went to the spot, and, in accordance with an order of this Court, prepared a map of the place. He decided that the door was newly opened out by the defendant in the separating wall; that that door was useless for all purposes to the defendant; that in his opinion it was made simply for the purpose of annoying the plaintiff. He, therefore, ordered it to be closed, and the defendant to be enjoined not to commit trespass on the plaintiff's premises.

The Subordinate Judge took a different view of the case, except so far as the period of time when this door was made. He held that the defendant had failed to prove that it was an old door, and that the plaintiff's case was not barred by limitation. For the rest he considered that the defendant was merely exercising his rights of property in his own wall, and that there was nothing which prevented him from opening a door in that wall, but that if the opening of that door was the source of any annoyance to the plaintiff by interfering with the privacy of the female members of his family, the plaintiff had a remedy in his own hands by building a wall, or erecting a screen of mats in the face of the opening. With regard to the alleged trespass, the Subordinate Judge found that the witnesses who were called upon to prove that the defendant passed through the plaintiff's court-yard had not substantiated that fact.

It appears to us that substantially this decision is right. There is no doubt, after hearing the circumstances of this case, that the defendant was actuated by malicious motives in opening the door, and that he could not have had any possible object in doing so but to cause annoyance to his brother's family, for we find from the map that the new door is exactly in a line with the privy belonging to the defendant, and that the door of the privy and the door in this wall are exactly opposite one another, so that any one using the privy would be able to overlook nearly the whole of the plaintiff's court-yard. There is also a finding of fact against the defendant as to his having no right of way through the plaintiff's court-yard, and that the sweepings of his house are not carried through the plaintiff's compound. At the same time, we agree

with the Subordinate Judge in thinking that the right of privacy is not an inherent right of property ; and that if it exists at all, it must be shown to exist by some local usage, by special permission, or by grant, and in this case there is no such local usage, permission, or grant proved. There seems to be no reason therefore why the defendant should not make use of his property in any way he pleases ; the wall is undoubtedly his, and he is merely making a door in his own property. The plaintiff, on the other hand, can very easily prevent, if he likes, all possible annoyance on account of this door, inasmuch as the whole of the land on the north side of it belongs to him, and he has only to build a screen or other erection to prevent any body in the defendant's house looking into his court-yard, or in any way disturbing the privacy of his family. The decision in the case of *Mahomed Abdoor Ruhim, vs. Birjoo Sahoo and others*, in Volume XIV., Weekly Reporter, page 103, lays down what we consider to be the right view of the law in deciding questions of this sort ; and, following that decision, we must uphold the judgment of the Subordinate Judge.

If, notwithstanding the order which is now made, the defendant commits any trespass upon the plaintiff's property by passing through or over any new screen or erection which the plaintiff may build, of course the plaintiff will have his right of action for trespass. And with reference to the circumstances of this case, and taking into consideration the clear evidence of ill-will and malice which actuated the defendant in making this door, we think that the defendant should not get costs but that each party should pay his own costs. The appeal is dismissed.

CALCUTTA HIGH COURT.

The 17th July, 1872.

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Right of Pathway—Execution of Decree.

BHOOBUN MOHUN MUNDUL* and another, (Judgment Debtors) *Appellants*,
versus

NOBIN CHUNDER BULLUB, (Decree-holder) *Respondent*.

A decree for the performance of a particular act (*e. g.*, the removal of certain obstructions in a pathway) can only be enforced under Sec. 200 Act VIII. of 1859, by the imprisonment of the judgment-debtor, or the attachment of his property, or both.

KEMP, J.—In this case the judgment-debtor is the appellant. It appears that in Chyet 1276, a suit was brought by the vendor of the plain-

* *Vide* 18, W. R., p. 282.

tiff to remove certain obstructions in a pathway ; these obstructions being described in the plaint as a wall running east and west, the foundation of a wall running north and south, and the closing of a pucca drain. The pathway is described as being 60 haths in length and 4 haths in breadth. The plaintiff obtained a decree, and it is this decree which we have to construe and execute. The decree is to the following effect, namely, "that the defendants do, within six weeks after the service upon them of this decree, remove the obstruction and re-open the pathway or lane leading from the north-west end of the plaintiff's house northwards to a public road as the same existed before the commencement of the suit and as described in the plaint." This decree of the Court is therefore a decree for the performance of a particular act on the part of the defendants. Such a decree, therefore, must be executed under the provisions of Section 200 of the Civil Procedure Code which enacts that, "If the decree be for any specific moveable, or for the performance of any contract, or for the performance of any other particular act, it shall be enforced by the seizure, if practicable, of the specific moveable and the delivery thereof to the party to whom it shall have been adjudged," or, as in this case where the decree has been for the performance of a particular act, "by the imprisonment of the party against whom the decree is made, or by attaching his property, and keeping the same under attachment until further order of the Court, or by both imprisonment and attachment, if necessary."

The Lower Appellate Court in its judgment says that the judgment-debtor has for months been able to keep the decree-holder out of his rights by trying every manœuvre possible in the execution department. The Judge then goes on to say that the case has been before his predecessor twice in appeal, and that on both occasions the order of the first Court was upheld. He then animadverts on the conduct of the pleader who appeared before him, and of the Ameen deputed to execute the decree ; and he then states that the objections of the debtor had been fully considered by his predecessor and that the appeal must be dismissed with costs.

In special appeal, it is contended that the decree simply ordered the performance of a particular act by the defendant, and that the Courts below had no authority under the decree and the Procedure Code to order the destruction of the building by the Nazir of the Court.

We think that this objection must prevail. Under the Section, the only way in which this decree can be executed is, as already observed,

by the imprisonment of the party against whom the decree is made, or by attaching his property, or by both imprisonment and attachment of property if necessary.

The order of the Judge must, therefore, be reversed and this appeal decreed, but without costs.

CALCUTTA HIGH COURT.

The 19th July, 1872.

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Right of Water—Possession—Magistrate's Order—Jurisdiction of Civil Court.

RAM KRISTO SIRCAR,* (one of the Defendants) *Appellant,*
versus

SHEIK KALOO and others, (Plaintiffs) *Respondents.*

A suit to get rid of the effect of an order passed by a Deputy Magistrate under Sec. 320 Code of Criminal Procedure, declaring a certain river to be a public thoroughfare, and to have it declared that plaintiffs are entitled with others to use the water of the said river by raising bunds or dams in the bed of the stream as heretofore, will not lie in the Civil Court, the only way in which the Deputy Magistrate's order can be got rid of in the Civil Court being by distinct proof of plaintiffs' title to exclusive possession of the right of water claimed.

GLOVER, J.—The point involved in this case is one of considerable importance, and we have taken time to consider what our decision should be.

The plaintiffs come into Court to get rid of the effect of an order passed by the Deputy Magistrate under Section 320 of the Criminal Procedure Code, and to have it declared that they are entitled with others to use the water of the Kanoonuddes, by raising bunds or dams in the bed of the stream as heretofore.

And the first question is whether such a suit will lie in the Civil Court.

The objection was taken by the defendants in both the Courts below but was decided against them, as it appears to us, without any clear understanding on the part of either Moonsiff or Subordinate Judge as to what the nature of the objection was. The Moonsiff says that, inasmuch as Section 320 provides for a suit in the Civil Court to establish rights against an order passed by a Criminal Court, therefore the pre

* *Vide* 18, W. R., p. 254.

sent suit lies, and the Subordinate Judge comes to the same conclusion in even a more summary manner.

We are of opinion that the objection is a valid one, and must be allowed.

The Deputy Magistrate who decided the case under Section 320 Code of Criminal Procedure against the present plaintiffs, did so on the ground that the Kanoonuddee was a running stream open to the use of all, and that the plaintiffs had no right to dam it up to the exclusion of the public.

This decision may have been right or wrong, but it was one which the Deputy Magistrate was competent to give, and under Section 320 the only way in which it could be got rid of was by the plaintiffs proving in a competent Court, *i. e.*, Civil Court, that they were entitled to exclusive possession of the right of water claimed.

The only question, therefore, which the Civil Court could determine and by its determination do away with the effect of the Deputy Magistrate's order, was the right to "exclusive" possession. It could not nullify the decision under Section 320 by declaring that the plaintiffs had some kind of a right in the water of the river, but only by judicially finding that the right claimed was supreme, and that no one else had any right at all.

Now, in this case the plaintiffs have not claimed and do not claim any "exclusive" right; all that they ask for is a share of the water; they do not even claim the privilege of entirely damming up the channel, for they allege that side openings were always permitted by which water could pass down stream to the occupants of villages situated below.

The plaintiffs, moreover, declare that the inhabitants of several other villages are interested in the right claimed.

There can in fact be no doubt that the right sought is not in any sense an exclusive right, nor has any attempt been made to prove that any such right ever existed. The Deputy Magistrate has declared the river to be a public thoroughfare in the rains and open to the use of the public at all times, and the Civil Court cannot interfere with that order, or declare what is decreed to be a public highway, a private appanage, without distinct proof of the exclusive title of the parties claiming.

In this case the plaintiffs set up no such title, and the Civil Court therefore could not entertain the suit.

The appeal is allowed, and the decrees of the Courts below reversed. Under the circumstances, however, we shall make no order as to costs.

CALCUTTA HIGH COURT.

The 11th September, 1872.

The Hon'ble F. B. Kemp and C. Pontifex, Judges.

Julkur Rights—Right of Fishery—Accretions.

KALEE SOONDUR ROY* and others (some of the Plaintiffs) *Appellants*,
versus

DWARKANATH MOJOOMDAR and others, (Defendants) *Respondents*.

In a suit to establish a right of fishery in a river, where the right was not opposed and the plaintiffs obtained a decree, the Lower Appellate Court—which also found that the disputed body of water south of the river occupied what was once its bed and was connected with the river by a narrow inlet—reversed the decree on the ground that it was possible this communication might silt up later in the year.

Held that the Lower Appellate Court's decision was wrong in law, and that, on the finding, the plaintiffs were entitled to a decree.

Held also, that if the flowing stream dried up, and the defendants acquired a right to the land by the law of accretion, that right would be subject to the exercise by the plaintiffs of their prior right of fishery.

KEMP, J.—We think the decision of the Judge in this case is wrong in law. It is admitted that the plaintiffs have the right of fishery in the Khurye river, and the Judge himself says that this right is not disputed by the opposite party. The Judge also found that the disputed body of water shewn in the map on the south of the river Khurye occupies what was once the bed of that river, and he also says that it is connected with the river Khurye on the west by a narrow inlet. The Judge does not find on any evidence that the river Khurye has become disconnected from the disputed sheets of water; but he seems to think that it is possible that the communication may silt up later in the year, and on this ground alone he reverses the decision of the first Court.

In special appeal, it is contended that this decision is wrong in law, on the ground that as the Judge has found that the disputed julkur occupies the original bed of the river Khurye and is connected with the flowing channel as shewn in the undisputed Ameen's map, the plaintiffs, as the undisputed proprietors of the julkur rights in the Khurye are clearly entitled to a decree. This being so, and there being a finding that the river Khurye is connected with the disputed sheet of water

* *Vide*, 18, W. R., p. 460.

and moreover, even if it was not so connected, it having also been found that the disputed sheet of water covers the original bed of the river which has been decreed to the plaintiffs, they are entitled to exercise their right of fishery over that water. It has been said in the course of the argument that the Court should hold that the plaintiff julkur rights would cease when the communication between the disputed sheet of water and the flowing stream of the Khurye river dries up, as the plaintiffs would have to trespass upon the lands of the defendants to enable them to exercise their rights of fishery. We do not see that this would follow at all, for there is an approach to the disputed sheet of water by the Mirzapore Khál which would not necessitate any trespass on the defendants' lands for the exercise of their julkur rights by the plaintiffs; and moreover, the defendants having acquired their right to this land by the law of accretion, this right must be subject to the exercise by the plaintiffs of their right of fishery which had been decreed to them prior to the accretion of the land in the defendants' occupation.

We, therefore, reverse the decision of the Judge and restore that of the first Court with costs.

CALCUTTA HIGH COURT.

The 29th November, 1872.

The Hon'ble J. B. Phear and W. Ainslie, Judges.

Water-courses—Rights—Embankments.

BABOO CHUMROO SINGH* and others, (Plaintiffs), *Appellants*,

versus

MULLICK KHYRUT AHMED and others, (Defendants) *Respondents*.

Where water flows in its natural course from somewhere outside A's land, through it, and onwards to other people's land, A is not entitled to stop the flow by an embankment across it, unless he can make out some special right to do so.

Such course is a part of the natural condition of the land, and the flow of the water over it, when it occurs, is a natural incident.

PHEAR, J.—It appears to us that the appellant has failed to make out a good ground of appeal in this case. As far as we can understand the facts of the case gathered from the judgments of the Lower Appellate Court and the Court of first instance, and passing from these facts to the meaning of the Judge in the judgment which is before us, we think he means to find distinctly that there is a natural flow of water in a defined

* *Vide* 18. W. R., p. 525.

course caused by the overflow at times of the stream at Bowree Bridge, a place outside the plaintiff's land, that this water flows in a defined course through the plaintiff's land to the defendant's land ; and upon that finding, the Judge has said that the plaintiff is not entitled to stop the flow of that water in this defined course by maintaining an embankment across it, unless he can make out some special right to do so ; that the plaintiff has failed to make out any such right, and, therefore, the Judge has dismissed his suit.

It appears to us that, on the facts which we thus suppose he has found, the Judge's determination is correct. It may be no doubt that in a sense this flow of water is casual, and that the course which the water pursues may, at other times of the year, be used for agricultural purposes, well enough probably for the growth of the paddy. But if the flow of water is a natural flow of water in a defined course from somewhere outside the plaintiff's land, through his land, and onwards to other people's land, he must allow it to pass on : he can only enjoy just the same right in it as all other persons similarly situated, namely, the right to make a reasonable use of that water as it passes. What is a reasonable use of the water as it passes, is no doubt often a very difficult question indeed to answer. But that question is not now before us. The decree of the Court below only goes to the extent of saying that the plaintiff is not entitled to stop the course of the water and take the whole of it into his own land.

Baboo Mohesh Chunder very ingeniously argued that the effect of the judgment was to give the defendant a right of easement over the plaintiff's land. But that, we think, is not the case if we interpret the judgment and the findings of the Court below rightly. If the course of the flow of water in this case is the natural course of the water, it constitutes a part of the natural condition of the plaintiff's land ; and the flow of the water over it at times, when it occurs, is not a burden put upon that land for the benefit of the defendant, it is a natural incident to the land in the condition in which it is. The case which is reported in the XIII., Weekly Reporter, page, 144, has been cited in support of the appellant's contention. We desire to say that we entirely concur in that judgment and the reasons upon which it is founded. But it appears to us that it has no immediate application to the present case. The essence of the decision then given by this Court is that the plaintiff was entitled to use the water falling on his own land and to erect a bund in such a way as to make use of it. Here the water which is the subject of con-

test is not water which had first fallen on the plaintiff's own land, but water which had collected together and assumed a defined course before it came to his land.

For these reasons we think the appeal must be dismissed with costs.

CALCUTTA HIGH COURT.

The 18th April, 1873.

The Hon'ble Dwarkanath Mitter and E. G. Birch, *Judges.*

Opening a Pathway—Criminal Court—Jurisdiction.

GOOROO PERSHAD ROY* and others, (Plaintiffs) *Appellants*,

versus

PROBHOO RAM CHUTTOPADHYA and others, (Defendants) *Respondents.*

Plaintiffs sue alleging that, when they commenced to rebuild a dilapidated wall which stood on the disputed ground with a doorway through it, defendant No. 1 brought a complaint of wrongful restraint against them; that the Deputy Magistrate, without inquiring into the charge, made an order with the consent of the complainant in that case directing him to open a path. Plaintiffs' suit is to have the pathway closed. The first Court held that it had no jurisdiction to entertain the suit. The Lower Appellate Court concurred with the Moonsiff in dismissing the suit.

Held that, as there was nothing to show that the road was a public thoroughfare, or that the order passed by the Deputy Magistrate was passed under Sec. 308 Criminal Procedure Code, the Lower Courts were wrong in refusing to entertain the suit.

MITTER, J.—In this case it is clear that the Lower Courts were wrong in refusing to entertain the suit. There was no order passed by the Deputy Magistrate under the provisions of the 308th Section of the Code of Criminal Procedure. It appears that the defendant in this suit brought a complaint against a third person under Section 341 of the Indian Penal Code, which relates to the offence of wrongful restraint. The Deputy Magistrate, without enquiring into the charge, made an order with the consent of the defendant in that case, directing him to open a road three cubits wide. There was nothing whatever to show that that road was a public thoroughfare, or that the order passed by the Deputy Magistrate was passed under the provisions of Section 308. The rulings referred to by the Lower Courts do not therefore apply to the present case.

The case is accordingly remanded to the Court of first instance for trial on the merits.

* *Vide*, 19, W. R., p. 426.

CALCUTTA HIGH COURT.

The 17th June, 1873.

The Hon'ble Louis S. Jackson and Dwarkanath Mitter, Judges.

*Prescriptive Right—Air and Light.*KALEE DOSS BANERJEA,* (Defendant) *Appellant,**versus*BHOOBUN MOHUN DOSS, (Plaintiff) *Respondent.*

Plaintiff having purchased one portion of a piece of ground on which stood a dwelling-house, defendant about the same time obtained a gift of another portion. Plaintiff pulled down the old house, and built a new one on the same ground, and defendant also built a house on his land. Plaintiff thereupon complained that, on his opening windows, defendant raised a wall whereby his air and light were obstructed. The Lower Courts gave him a decree requiring defendant to remove the front of a certain window, and clear the passage of air and light :

Held that plaintiff had no right which would justify the decree ; any prescriptive right which the old house may have conferred having disappeared with the construction of the new one.

JACKSON, J.—It appears to us that the decisions of the Courts below in this case cannot stand. The plaintiff purchased part of a piece of ground on which stood a dwelling-house, and about the same time the defendant also obtained a gift of another portion of the same piece of land. The plaintiff pulled down the old house and built a new one upon the same ground, and the defendant also built a house upon the land which he had acquired. The plaintiff thereupon complained that, on his opening windows in the house newly-built, the defendant raised a wall whereby his air and light were obstructed.

The Moonsiff gave the plaintiff a decree requiring the defendant "to remove the wall from the front of the window kept in the southern direction of the first story of the plaintiff's room on the remote east, and to clear the passage of air and light," and this decision has been affirmed on appeal by the Subordinate Judge.

It appears to us that the plaintiff had no right upon which such a decree could be justified. Whether or not there could have been any remedy if the old house had been in existence, it appears to us that, with the construction of the new house, the prescriptive right of the plaintiff, if any, disappeared. Besides, it appears that both the parties derived their title from one and the same person, and so long as the occupation of the latter continued the possession could hardly be adverse

* Vide 20, W. R., p. 185.

to the defendant. It seems to us, therefore, that under the circumstances neither party had the right of throwing obstacles in the way of the other in erecting houses, &c., on his own land. We think the plaintiff's suit ought to have been dismissed. The decisions of the Lower Courts are accordingly reversed, and plaintiff's suit is dismissed with costs of this Court and of the Courts below.

CALCUTTA HIGH COURT.

The 19th June, 1873.

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Right of Way—Non-user—Resumption.

RAJ BEHARIE ROY* and another, (two of the Defendants) *Appellants*,

versus

TARA PERSHAD ROY and others, (Defendants) *Respondents*.

Where a new way is substituted for an old one with the consent of the person entitled, and the non-user of the original way is accompanied by acts which warrant the Court in inferring an intention to release, the right of resumption is lost : the non-user need not extend over any defined period.

COUCH, C. J.—It is a question of fact whether the plaintiff had abandoned the old way and adopted the new one which the defendant had offered in substitution for it. Whether the user of one or two, or five or six years, is sufficient to show an abandonment of the old way must depend on the various circumstances of the case, and is to be considered by the Court which determines questions of fact. It has been found here as a fact that the old way was abandoned. Although no issue was framed by the Moonsiff raising that question, his finding upon it was after both parties had given evidence on the subject, and it was not said in the appeal to the Judge that he ought not to have tried it without framing an issue, or that any evidence had not been received by him which ought to have been received. Where a new way is substituted for an old one with the consent of the person entitled, and the non-user of the original way is accompanied by acts which warrant the Court in inferring an intention to release, the right of resumption is lost, and the non-user need not extend over any defined period.

The appeal must be dismissed with costs.

CALCUTTA HIGH COURT.

*The 5th July, 1873.*The Hon^{ble} E. G. Birch, *Judge.**Prescriptive Right—Injurious User.*SREEDHUR DEY,* (one of the Plaintiffs) *Appellant,**versus*ADROYTO KURMORAR and others, (Defendants) *Respondents.*

There can be no prescriptive right to injure another, even though such injury has the warrant of very ancient user.

BIRCH, J.—In this case, I think that the decision of the Lower Appellate Court cannot be sustained. The Judge remarks that “very ancient user is admitted, and no injury is proved;” and it appeared to him that the suit was brought from some spite, and was groundless. The Moonsiff went to the spot, and found that the defendants have been in the habit of throwing into the plaintiff’s tank the burnt earth of which their crucibles were made, and that by reason of their so doing, earth had accumulated in the bed of the tank on both sides of the ghat near the defendant’s house. The defendants have admitted in their grounds of appeal before the Judge that they had thrown this earth into the tank, and claimed a prescriptive right so to do.

There can be no prescriptive right in such a case as this, and it is quite clear that if the defendants persisted in throwing earth into the tank, the plaintiff might suffer greater injury than he has already sustained, by having the bottom of his tank raised. The Moonsiff’s order was that the burnt mud thrown by the defendants into the bed of the tank should be removed by them; and this order seems to me under the circumstances to be a proper one.

The decision of the Lower Appellate Court will be reversed, and that of the Moonsiff restored. The appellant is entitled to his costs.

* *Vide* 20, W. R., p. 237.

CALCUTTA HIGH COURT.

*The 19th July, 1873.*The Hon'ble F. A. Glover, *Judge.**Rights of Way and Water—User—Limitation.*JUGGESSUR SINGH* and another, (Plaintiffs) *Appellants,**versus*NUND LALL SINGH and others, (Defendants) *Respondents.*

Twenty years of peaceable and open enjoyment without interruption are needed to make a right of user absolute, whether it be a right of way or right of water.

Should obstruction be offered within the 20 years, a suit to recover the right of user must be instituted within 2 years after the last act of user.

GLOVER, J.—The Judge has found as a fact that the plaintiff had no user of the water since 1275 B. S., and that he was therefore barred by Section 27, Act IX. of 1871, the present suit not having been brought till 1278 B. S., or more than two years after.

The special appellant contends that the suit could not be brought any time within two years of the obstruction of the right of user by the defendant, and that the right to use the water of the tank was necessarily periodical, and not continuous.

I think that the plaintiff has lost his right. Section 27 makes no difference between rights of way and rights of water; both must be peaceably and openly enjoyed for a period of twenty years without interruption in order to make the right of user absolute. The interruption referred to must have occurred within the 20 years, and must be an obstruction by the act of some person other than the claimant.

In this case the obstruction complained of took place in 1278, or more than two years after the last act of user on the part of the plaintiff, and when according to the Section he had no right of user left which could be obstructed.

The illustration (b) to Section 27 shows the meaning of the law to be that there must be an exercise of the right by actual user within two years next before the institution of a suit for recovery.

Schedule 2 of the Limitation Act merely refers to the date of the cause of action supposing an obstruction to have been caused during the 20 years' user.

The appeal is dismissed with costs.

CALCUTTA HIGH COURT.

The 22nd July, 1873.

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover,
Judge.

Right of Drainage.

KOPIL POOREE,* (one of the (Defendants) *Appellant*,

versus

MANICK SAHOO, (Plaintiff) *Respondent*.

There is no reason why the proprietor of land on a higher level should not claim a right to have the water which falls thereon run off over adjoining land of a lower level, *i. e.*, to be drained.

COUCH, C. J.—We see no ground for a special appeal. It has been found that the plaintiff has a right to have the water which falls on his land run off from it over the defendant's land, the plaintiff's land being on a higher level than the defendants.

The case quoted from Marshall's Reports† does not apply to such a case as this. There the plaintiff insisted that the flow of water from his neighbour's land should continue for his benefit, and the water should continue to be collected on his neighbour's land and allowed to flow from it to his own.

There is a right, which is not uncommon and is more like the right now claimed, namely, that of having water which falls on the roof of a man's house that projects over his neighbour's land, fall on it and run off over it. There is no reason that the plaintiff should not have such a right as is claimed in this case. All that the defendant has to do is to provide a passage for the water from the plaintiff's land over his own. He is not required to keep his land in a marshy state; he has only to allow the plaintiff's land to be drained as it has hitherto been.

The appeal must be dismissed with costs.

* *Vide* 20, W. R., p. 287.

† Page 506.

CALCUTTA HIGH COURT.

*The 24th July, 1878.*The Hon'ble Louis S. Jackson and E. G. Birch, *Judges.**Right of Way—Processions.*LOKENATH GOSSAMEE,* (one of the Defendants) *Appellant,**versus*MONMOHUN GOSSAMEE and others, (Plaintiffs) *Respondents.*

A general right of way includes a right to carry marriage and funeral processions.

JACKSON, J.—The plaintiffs in this case sought to establish a general right of way and passage for boats with marriage and funeral processions through a khal leading to the defendant's tank, and also to establish their right to use the waters on the ghat of the said tank for the purposes of certain ceremonies. This right was claimed by virtue of prescription arising from use for very many years. The Moonsiff gave the plaintiffs a decree in full, which the Judge modified by declaring the plaintiff's general right of way, but refusing to declare their right to carry marriage and funeral processions. This exception was founded upon the fact that in the Judge's opinion the plaintiffs had "established no express right to bring funeral or marriage processions across this tank."

We have been referred by the plaintiffs who as well as the defendant, appellant, object to this decision to a case very much in point decided by two Judges of this Court—the late Mr. Justice Elphinstone Jackson and the late Mr. Justice Mookerjee, where the Lower Appellate Court having decreed to the plaintiff a general right of way, but excepted a pathway for marriage processions, such finding was disapproved by the Division Court, and it was ordered that the case should be remanded in order that it might be found "whether by the custom prevalent in that part of the country it is usual, when making grants to the public of a thoroughfare or path way over one's field, to make the grant in such restricted and limited a form as to exclude all processions whether on foot or not, and whether in this particular case there is evidence to show that the original grant when made was of this nature or not."

The present case differs from the one cited only in this respect that there the right of way claimed was over dry land or pathway, whereas in this case the plaintiffs and their family claim the right of way over the water. But the observations of the learned Judges in that case are quite

applicable to this case. The defendant's Vakeel has sought to convince us that the plaintiffs really claim two distinct things; firstly, a general right of way, and secondly, a separate right to carry marriage and funeral processions. It seems to us that this was not so, and that the marriage and funeral processions and the certain other ceremonies spoken of were only instances in which the general right was to be exercised. The defendant gave no evidence to show that the plaintiffs' right was limited so as to exclude marriage and funeral processions, &c. His contention was that the plaintiffs had no right whatever. This question has been found in favor of the plaintiffs, and it seems to us that that finding includes the plaintiffs' right to pass with marriage and funeral processions which any person of the plaintiffs' position would regard as the most valuable exercise of such right. We think the judgment of the Lower Appellate Court in so far as it varies the judgment of the Moonsiff must be reversed, and the decree of the Moonsiff restored with cost.

CALCUTTA HIGH COURT.

The 31st July, 1873.

The Hon'ble J. B. Phear and G. G. Morris, Judges.

User—Acquiescence.

NIL KANT SAHOY,* (Defendant) *Appellant*,

versus

JUJOO SAHOO, (Plaintiff) *Respondent*.

In a suit to enforce a right of easement on the ground of user, the Lower Appellate Court was held to have done wrong in refusing to go into enquiry as to the length of time plaintiff had enjoyed the user because the right of the defendant also was of very short standing.

A party cannot be allowed in equity to stand by and see his own rights infringed without complaining in any way of such infringement, but is bound at once to do his best to prevent a permanent obstacle being put in the way of his enjoyment of these rights.

PHEAR, J.—The plaintiff in this case sued to enforce his right to an easement in the shape of a drain passing across the land of the defendant. He did not make the claim under a specific grant of the easement from an owner of the land. He relied upon user for a time sufficient to confer the right upon him.

The suit was brought in October 1871: and at that time the provi-

* Vide 20, W. R., p. 328.

sions of the new Limitation Act were in operation. According to that enactment twenty years' user as of right is necessary for the purpose of establishing the right of an easement of this kind. And therefore in the present case it is incumbent upon the plaintiff to make out that he has used the drain which he seeks to have kept open for his benefit for a period of at least twenty years before the date of the institution of his suit.

The Subordinate Judge has declined to enter into any enquiry as to the length of time during which the plaintiff has had user of this drain, because he says, however short the duration of the user of the plaintiff may be, "the right of the defendant also is of very short standing: nay, it is of the time subsequent to that when the drain used to run." He goes on to say:—"He has no right to prevent the plaintiff from the use of his drain."

Clearly, the Appellate Court was wrong in refusing to go into that question, and consequently the decree must be reversed. But whether the case is to be sent back or not depends upon the question whether or not there is evidence on the record legally sufficient to establish the plaintiff's allegation of right. We find, however, on enquiry that there is no evidence on the record of such user of the drain as would be necessary for the purpose of establishing the right of easement claimed. None of the witnesses who speak to user, carry that user so far back as twenty years before suit.

Also with regard to the issue raised between the parties relative to the chubootarah,—although we are told that the right of passage or way for the bullocks was not disputed, we cannot find that there is any evidence upon which the Court could come to the conclusion that that right of passage had been interfered with by the erection of the chubootarah; and therefore it must be useless to send back the case for the re-trial of this issue likewise.

The result is that the decrees of both the Lower Courts must be reversed, and the suit of the plaintiff dismissed with costs in all the Courts.

We will add that, supposing that the plaintiff had the right which he alleges in this case, he could not be allowed in equity to stand by and see the defendant building a house and erecting a chubootarah before he complained in any way of his right being infringed by those acts. He was bound at once to do his best to prevent the defendant from putting a permanent obstacle in the way of the enjoyment of his rights. If he silently stands by and permits him to go to the expense of erecting a

building upon his own land before he complains, a Court of equity ought to be very slow to listen to his complaint when the consequence of giving effect to that complaint will be to cause a very considerable damage and loss to the defendant.

A GENERAL DIGEST OF CRIMINAL RULINGS.

Mr. G. H. Khandekar of Poona has recently published "A General Digest of the Criminal Rulings and Decisions of the High Courts established in India, from 1862 to 1873." It is a handy volume and neatly got up. From what we have seen of the work we are able to say that the author has taken considerable pains in making his book, one of very easy reference. It is designed for the Bench, the Bar and the Public and we have no doubt that it will prove really useful to them. To show to our readers and the public that the author has taken great pains and good care in digesting the rulings under different heads, we make the following extracts :—

HURT.

CAUSE HURT (*administering drug with intent to*) P. C., S. 328.

8. The words "other things" in S. 328 P. C., must be referred to the preceding words, and be taken to mean "unwholesome or other thing," and not other thing simply. 1, *W. R.*, 7.

9. Held by the majority of the Court (*Seton Karr J. dissenting*) that the offence of administering deleterious drugs, when life was not endangered, is punishable under S. 328 P. C., and not as for grievous hurt under S. 326. 4, *W. R.*, 4.

10. Held that a person who placed in his toddy-pots juice of the milk-bush, knowing that if taken by a human being it would cause injury, and with the intention of thereby detecting an unknown thief who was in the habit of stealing the toddy from such pots, and which toddy was drunk by, and caused injury to, certain soldiers who purchased it from an unknown vendor, was rightly convicted, under S. 328 P. C. of "causing to be taken an unwholesome thing with intent to injure," and that S. 81, which says that "if an act be done without any criminal intention to cause harm, it is not an offence," did not apply to the case. 5, *W. R.*, 59.

CAUSING HURT (*voluntarily*) P. C., S. 321.

11. Where a wife died from a chance kick in the spleen inflicted by her husband on provocation given by the wife, the husband not knowing that the spleen was diseased, and showing by the blow itself and by his conduct immediately afterwards that he had no intention or knowledge that the act was likely to cause hurt endangering human life.—Held that the husband was guilty of an offence under S. S. 319 and 321 P. C. and not of an offence under S. S. 320 and 322. 8, *W. R.*, 29.

12. A disability for a fortnight is punishable for voluntarily causing hurt. 1, *W. R.*, 9.

CAUSING HURT (*voluntarily—on provocation*) P. C., S. 334.

13. Causing hurt on grave and sudden provocation to the person giving the provocation is chargeable as an offence under S. 334, and not under S. 324, P. C. 1, *B. R.*, 17.

CAUSING HURT (*voluntarily—to extort confession, or to compel restoration of property*) P. C., S. 330.

14. To bring a case under S. 330 P. C. it must be proved that the hurt to the complainant was caused with intent to extort a confession of some offence or misconduct punishable under the Indian Penal Code. That section, therefore, does not apply to a case where the confession extorted had reference to a charge of witchcraft. 13, *W. R.*, 23.

15. A charge may be made under S. 330 of causing hurt for the purpose of extorting information which might lead to the detection of an offence, even if the supposed offence has not been committed. The offence which that section intended to describe is that of inducing a person by hurt to make a statement, or a confession having reference to an offence or misconduct; and whether that offence or misconduct has been committed is wholly immaterial. 20, *W. R.*, 41.

CAUSING HURT, VOLUNTARILY (*punishment for*) P. C., S. 323.

16. The prisoner, having received great provocation from his wife, pushed her with both arms so as to throw her with violence to the ground, and after she was down, slapped her with his open hand. The woman died, and on examination it appeared that there were no external marks of violence on the body, but that there was a certain degree of disease of the spleen, and that death was caused by the rupture of the spleen. Held, under the circumstances, that the prisoner was guilty of causing hurt and not of culpable homicide not amounting to murder. 5, *W. R.*, 97.

17. Where a person scourged another with nettles in order to extract property from the sufferer, and the Magistrate tried the case as one of hurt (under S. 323 P. C.) and extortion (S. 384), although the accused ought to have been charged under S. 327, and tried by the Court of Sessions, the High Court declined to interfere under S. 404* O. Cr. P. C., and direct a new trial, believing that substantial justice had been done in the case. 18, *W. R.*, 8.

18. Where, according to the prisoner's own confession (which was the only direct evidence against her,) she, with a view to chastising the deceased, her daughter of 8 or 10 years of age, for impertinence, but without any intention of killing her, gave her a kick on the back and two slaps on the face the result of which was death. Held that the conviction should be under S. 323 of the P. C. of voluntarily causing hurt, and the punishment one year's rigorous imprisonment. 8, *W. R.*, 29.

HURT, GRIEVOUS, P. C., S. 320.

19. To establish a charge of grievous hurt, it is not necessary to prove that the accused struck the complainant so severely as to endanger the latter's life. 18, *W. R.*, 22.

20. When there is neither intention, knowledge, nor likelihood that the injury inflicted in an assault, will or can cause death, the offence is not culpable homicide not amounting to murder, but grievous hurt. 2, *W. R.*, 39.

21. There must be evidence to prove that hurt as described in S. 320 P. C. as grievous hurt has been caused before a conviction can be had under above section. 12, *W. R.*, 25.

22. A disability for 20 days constitutes grievous hurt. 1, *W. R.*, 9.

23. Where bone fractures have been caused in addition to other injuries, the offence committed is grievous hurt triable by a Court of Session, and not hurt cognizable by a Magistrate. 5, *W. R.*, 65.

24. When the result of a joint attack by several persons on one party is fracture of the arm of the party assaulted, the offence committed is grievous hurt and not assault; and as the attack was made in furtherance of a common object; all are equally guilty of the same offence. 5, *W. R.*, 12.

* See S. 297, N. Cr. P. C.

CAUSING GRIEVOUS HURT (*by rash act*) P. C., S. 338.

25. Defendant was convicted under S. 338 P. C. of causing grievous hurt. The evidence showed that the defendant was being driven in a carriage to her house through the streets of the town between the hours of 7 and 8 p. m. That the carriage was being driven at an ordinary pace and in the middle of the road; that the night was dark, and the carriage without lamps, but that the horse-keeper and coachman were shouting out to warn foot-passengers; that the defendant's carriage came into contact with the complainant's father an old deaf man, and that complainant's father was thereupon knocked down, run over and killed. Held, upon a reference, that the question for the Court was whether there was any evidence that the death of the deceased was induced by an act negligently and rashly directed by the accused, and that there was no such evidence. The conviction was accordingly quashed. 6, *M. R. App.*, 32.

CAUSING GRIEVOUS HURT (*on provocation*) P. C., S. 335.

26. A person who, by a single blow with a deadly weapon, kills another entering at dead of night into a dark room where he and his wife were sleeping separately for the purpose of having criminal intercourse with her.—Held guilty of causing grievous hurt on a grave and sudden provocation. 3, *W. R.*, 55.

27. Causing grievous hurt on grave and sudden provocation is punishable under S. 335 P. C. without any intention or knowledge of likelihood of causing such hurt. 4, *W. R.*, 21.

CAUSING GRIEVOUS HURT (*Voluntarily*) P. C., S. 322.

28. Where, in a case of robbery attended with death, there was no intention, of causing death or such bodily injury as was likely to cause death, the conviction was altered from voluntarily causing hurt in committing robbery, to voluntarily causing grievous hurt in committing robbery. 6, *W. R.*, 16.

29. In cases of hurt or grievous hurt, the question should be considered, as to who was the aggressor, and whether the offence was committed in the exercise of the right of private defence. 2, *W. R.*, 59.

PRIVY COUNCIL.

The 21st May, 1831.

LUXIMON ROW SADASEW,*

versus

MULLAR ROW BAJEE.

On Appeal from the Sudder Dewanny Adawlut of Bombay.

Onus Probandi—Partition—Hindoo Law.

The *onus* of proof is on the party seeking to except any property from the general rule of partition according to Hindoo Law.

THE LORD CHANCELLOR.—(In delivering the judgment of their Lordships said).—The grounds upon which Mr. Elphinstone appears to have come to his decision are, that the proof lies upon the party seeking to except any property from that principle of partition known to the Hindoo law, and that the appellant not having sufficiently proved that it is unnecessary to go further; that he not having brought forward proof that this property is within those exceptions, the general rule of partition must prevail.

It appears from a case thrown out in the course of the argument, that the exceptions themselves form a sufficient ground for assuming that the proof is upon the party who would seek to bring himself within it. They are very minute in their conditions; and in one instance, that inference appears to be furnished by the rules of the Court restoring property to the operation of the principle after it shall have been brought within the exceptions. For instance, learning is one of the undeniable exceptions; and if that shall be proved, it brings the property within the exception. But it is added, if it shall be shewn there was equal learning possessed by the other parts of the family, that gives them a claim to it notwithstanding the circumstance of its being brought within the exception. So that here one proof brings it within the rule, and another throws it back, notwithstanding the exception. This is one illustration, among many others, which might be given. I mentioned another in the course of argument, as to the clothes of a party incapacitated by nature or by accident from procreating children, which appear by the Hindoo law to be excepted. All these details shew that the proof must be upon the party seeking to bring it within the excepted case.

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* Vide 5, W. R. (P. C.) p. 67.



PRIVY COUNCIL.

The 6th January, 1834.

RAJAH HAIMUN CHULL SING,*

versus

KOOMAR GUNSHEAM SING.

On appeal from the Sudder Dewanny Adawlut of Bengal.

Long Possession prima facie Evidence of Title—Adoption in Bareilly.—

Uninterrupted and undisputed possession for a long period of time constitutes sufficient *prima facie* evidence of title ; but if this possession is admitted to be under an adoption, it will avail nothing if the adoption fails.

It may be admitted, on the assumption of the proof of undisputed possession for a long space of time, that every presumption of fact should be made in favor of the validity of the act by virtue of which it took place, and that the *onus* of proving those circumstances which render it invalid in point of law, if the nature of the case requires such proof, ought to lie on the other side.

In the district of Bareilly the authority of the husband is essential to the validity of an adoption.

MR. JUSTICE J. PARKE.—This case comes before their Lordships on an appeal from a decree of the Sudder Dewanny Adawlut of Bengal, in a suit originally brought by the appellant, in the month of December 1810, in the Provincial Court of Bareilly, against Ranee Bhuddorun, for the recovery of the zemindary or talooka of Rohroh. The appellant claimed as the adopted son of the deceased Rajah Koosul Sing, proprietor of that talooka, who died about 1775. He claimed by virtue of an adoption which was made about 1778 or 1779, when the appellant was two years old, by one or both of the deceased Rajah's widows, Ranee Chunder Bunse and Ranee Bhuddorun. He also alleged that he had been in possession of the zemindary, and acknowledged as the Rajah or Zemindar, from that time till the occupation by the British Government, in 1801 or 1802, of the Ceded Provinces, of which this formed a part. He stated that the first triennial settlement was formed with him in that character in 1803, and that on its expiration the original defendant, the Ranee, fraudulently acquired possession and obtained the subsequent settlements.

The defendant disputed the fact of the alleged adoption, and denied its validity if true, and insisted that the appellant never had the possession of the zemindary in his own right.

* *Fide* 5, W. R. (P. C.) p. 69.

Evidence was given on both sides in the Provincial Court as to the facts (but none in support of the fraud suggested by the claimant), and the opinion of the Pundit of the Zillah Court was obtained upon the law; and on the 12th of April 1813 a decree was pronounced against the claim of the appellant. From that decree an appeal took place to the Sudder Dewanny Adawlut in January 1815. Pending the proceedings in that Court, and in the course of the same year, the original defendant died, and a proclamation was made for her heirs to come in and defend the suit.

On the 8th July 1817, the present respondent who claimed to be the heir of the deceased Rajah as his son by a Gundarpy marriage to a seventh wife, and Rutton Sing, who claimed as the son of the daughter of Ranee Chunder Bunse, were admitted as acting for the deceased respondent. In the meantime the Collectors of the district appear to have put the appellant into possession of a moiety of the malikana rights of the zemindary in question during the life of the Ranee Bhuddorun, and after her death, in October 1815, into the exclusive possession of the whole; and this possession appears to have continued until the determination of the suit.

The Pundits of the Sudder Court, and also the Pundit of the Provincial Court of Bareilly, were afterwards consulted. Some precedents were referred to which form a part of the printed Appendix, and the Court pronounced its final decree on the 12th August 1817, by which, in the first place, the decision of the Provincial Court disallowing the claims of the appellant was confirmed, and in the second, it was finally and fully ordered, that the property in dispute should, in right of succession, descend to Gunsheam Sing, the son of the Rajah Koosul Sing, as the proprietor; that the claim of Rutton Sing should be disallowed, and Gunsheam Sing is, in effect, directed to be put into possession of the disputed zemindary.

From this decree an appeal has been made to the King in Council, and the case has been argued with great talent on both sides.

The two parts of this decree require a distinct consideration. As to the first, the only question is, whether, upon the evidence adduced by the appellant and the Ranee, he has established a right to the zemindary as against her; and in deciding that question, the alleged title of the now respondent (which, if true, would have prevented the adoption altogether) must be wholly omitted. It has never been proved as a fact in the cause for decision, as between the appellant and the Ranee, nor

indeed for any purpose, that the deceased Rajah had a child, the present respondent.

Upon the evidence, the whole question turns on the fact of the alleged adoption, and its validity according to the Hindoo law.

Their Lordships by no means question the doctrine contended for by the learned Counsel for the appellant, that uninterrupted and undisputed possession for a long period of time constitutes sufficient *prima facie* evidence of title. That is a recognized rule of our law, and upon general principles, for the sake of the security of property, seems to be applicable to that of other countries, where the lawgiver has not specially established a different provision. Nor is it disputed that such a possession, even for a less period than that which elapsed between the years 1778 or 1779, when the alleged adoption took place, and 1805 or 1806, when the Rancee obtained the settlement of the talooka, would have been sufficient to have thrown the burthen of disproving the title of the claimant on the opposite party.

Whether, in this case, such a possession has been proved on the part of Haiman Chull Sing is very doubtful; but their Lordships think it wholly unnecessary to examine the evidence of it in detail, because, assuming that the possession was proved, it is perfectly clear, upon the plaintiff's own shewing, that such possession is referable to his alleged title by adoption and to that alone. If there was no title by adoption, the possession avails nothing.

Of the fact of an adoption by the senior widow, no reasonable doubt can be entertained; and therefore the question is reduced, upon this branch of this case, to the single point: Whether that adoption was valid in point of law, or not?

It may also be admitted, on the assumption of the proof of undisputed possession for a long space of time, that every presumption of fact should be made in favor of the validity of the act by virtue of which it took place, and that the *onus* of proving those circumstances which render it invalid in point of law, if the nature of the case requires such proof, ought to lie on the other side.

Does it then appear that this adoption was, by the Hindoo law in force in this district, invalid? It must be first determined what the provisions of that law are.

On the part of the appellant it is insisted that a widow (and if there be more than one, the senior widow) may make a valid adoption of a relative of the deceased husband, provided it be done with the con-

sent of the nearest relatives of that husband, who are the widow's natural guardians ; and that if an only or eldest son be given, such gift may be made without guilt in the giver, if made in the particular form called *dhayamushyayana*, and if not, is nevertheless valid when made.

On the part of the respondent it is insisted, that the authority of the husband is absolutely essential to the validity of the adoption, and that a gift of an only or eldest son, unless in the above-mentioned form, is not merely a violation of the law in the giver, but is absolutely void.

The Court of Bareilly pronounced against the appellant, on the ground that though the widow might make an adoption, she could not do so without the consent of her own relations, which was not given. The Sudder Dewanny Adawlut confirmed that decision on a different ground ; namely, that by law, the authority of the husband was essential, and that such authority was wanting in this case.

Their Lordships are now to decide, whether that position is correct ; and they must decide with the means of information with which their Lordships have been supplied, partly from the Native authorities in the several Courts below, and partly from the text books which have been cited in the course of the argument. They are bound to act according to the usual practice, and not to advise the reversal of the decree of the Court, unless they are satisfied that the decree is wrong ; and more especially, in a case in which the Judge of that Court, from his education and habits, must necessarily have more information on the subject than most of their Lordships now present can be supposed to possess.

Upon a full consideration of these authorities, their Lordships are of opinion that they cannot come to the conclusion that the decision of the Court below is wrong. According to the Native text writers it seems to be clear, that the ancient law of Hindoostan required the authority of the husband, but it is also clear that the strictness of that law has been in many districts relaxed or modified by local usage ; and the opinion of the Sastries, as published in Mr. Borrodaile's Bombay Reports, is very strong to shew that in the Mahratta States to the west of the Peninsula, the law does not require any such authority to render the act valid. But that such relaxation has extended to this particular district is not, in their Lordships' judgment, established ; on the contrary, the weight of the authority is in favor of the opposite conclusion. The opinion of the Pundits of the Sudder Court, both in this case and the case of Shumshere Mull (Appendix, p. 83), and that of the Pundit of the Provincial Court of Appeal of Benares in the latter, appearing to

be entitled to more credit than those of the Pundits of the Zillah and Provincial Courts of Etawah and Bareilly and of the City Court of Benares.

Without pretending to decide what is the law in other districts of India, their Lordships feel bound to say, that in this particular district, upon the authorities brought forward in this particular case, they must pronounce that the law requires the direction of the husband in order to the validity of an adoption: at all events, they cannot say that it does not; which they must do in order to reverse the judgment in this case.

Then, was there such an authority given in this case? It is clear from all the evidence that it was not. There is no evidence of any kind leading to the supposition that it was. The interval of four years which elapsed between the Rajah's death and the adoption, raises a strong presumption that his authority was not given; for if it had been, a direction so important in a religious point of view, would naturally have been carried into effect much sooner after his death; and besides, no one pleading or document on the part of the appellant, at any stage of the case, suggests that such an authority was given.

Their Lordships therefore think, upon this view of the law, that upon the evidence in this case it clearly appears that the adoption was invalid, and the title which rests on that adoption, and was the foundation of the suit, being for this reason invalid, the appellant must fail in that suit, and so much of the judgment as affirms the decree of the Court below must be itself affirmed.

It is unnecessary to determine whether the other objections to the adoption were well founded: probably they were not.

The second part of the decree, which establishes the right of the respondent and in effect directs him to be put in possession of the zemindary, cannot, in the judgment of their Lordships, be supported.

It was contended that the appellant had no interest in that part of the decision, and could not be heard to complain of it. But, in truth, he had an interest; at least, it is not clear that he had not some interest. If he had acquired no right to the possession subsequent to that right upon which he founded his plaint, he could, perhaps, have had no ground to complain of a decision which, after negating his claim, affirmed that of another: but as he certainly acquired a possession of some sort by lawful authority, if the Collector's statement in evidence in the cause be correct, by a grant by the Executive Government after

the Ranees's death, that title should not have been disturbed by the decree of the Sudder Court establishing the right of another, who was not for this purpose a party to the cause, but the appellant should have been allowed to retain possession, as far as that Court was concerned, and the Executive Government, which gave the title, should have been left free to allow it to continue or to be taken away, as it thought fit.

That title was not given upon the footing of any preceding decree which was reversed, but probably was bestowed because the appellant was supposed by the Government to be the adopted heir; and the language of the Collector's report is in favor of that supposition. It may possibly have been given, because the zemindary was deemed a *bonam vacans*, and the appellant was thought a fit person to receive the grant. In the former case, it was for the Government to rectify the mistake, by withdrawing the grant after the affirmance of the decree of the Provincial Court and granting to whom it pleased. In the latter, the appellant ought to have been permitted to continue in possession, subject to be dispossessed by any one shewing a title not barred by lapse of time. But the Court of Sudder Dewanny Adawlut has no right at all to determine the question of title of a third person, for it was not the question in the cause, and that part of their decree which has this effect their Lordships will recommend to His Majesty to reverse, and after that reversal the Executive Government will deal with the possession as it thinks fit.

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PRIVY COUNCIL.

The 11th February, 1834.

RAJAH ROW VENCATA NILADRY ROW,*

versus

ENOOGOONTY SOORIAH AND RAMANIAH.

On appeal from the Sudder Dewanny Adawlut of Madras.

Competency of Judges seeing witnesses and hearing their evidence to judge of their credibility.

A tribunal sitting at a distance cannot be so competent to decide as to the credit to be attached as the tribunal who sees the witnesses and hears their evidence.

SIR THOMAS ERSKINE.—The question that has been raised in this case appears to be one entirely of fact, depending not upon inferences to

* *Vide* 5, W. R. (P. C.) p. 79.

be drawn from circumstances, upon which the judgments of men may vary, and from which a person at a distance may draw a different conclusion from the person who hears the cause, but it is a question depending upon the testimony of witnesses, upon facts to which they positively depose.

The plaintiff sought to recover property which he said was abstracted by the defendants. He called nine witnesses to prove his case; some of which actually asserted that they saw each individual article carried away by the defendants themselves. Other witnesses were called for the defendants, who positively swore that they saw the defendants go away, and that they did not carry away with them the things they are charged with carrying away. The whole question must depend upon the credit given to these witnesses, the known character of those witnesses, and the mode in which they gave their testimony. Upon these circumstances a tribunal sitting at a distance cannot be so competent to decide as the tribunal who heard the evidence and saw the witnesses.

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PRIVY COUNCIL.

The 26th November, 1836.

PRESENT :

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, T. Erskine, and Sir A. Johnston.

MOTEE LALL OPUDHIA,*

versus

JUGGURNATH GURG.

On appeal from the Sudder Dewanny Adawlut of Calcutta.

Onus Probandi—Razeenamah—Fraud—Duress—Evidence.

Where an appellant alleges that a Razeenamah was obtained from him by duress or fraud, the *onus* is on him to prove his allegation. Mere possibility or probability that there may have been such an origin of the transaction, is not sufficient to entitle a Court to set aside the Razeenamah.

Where also an appellant complains that he had not an opportunity of giving his evidence to the Court below, it is for him to shew that he had tendered evidence which the Court had rejected.

LORD BROUGHAM.—We shall not trouble the respondent upon this case. We are of opinion, in the first place, that the *onus* of proof lies

* Vide 5, W. R. (P. C.) p. 26.

clearly upon the appellant; the affirmative of the question, was or not this razeenamah obtained by duress. Fraud also is mixed up in this question of duress, but it is principally a question of duress, whether or not there was a conspiracy by these persons to obtain from him this release, and we are of opinion (as indeed there is no occasion to argue that point) that the *onus* lies upon the appellant to satisfy the Court here, as it lay upon him to satisfy the Court below, that there was such duress or fraud through which the razeenamah was obtained. It is not sufficient to say that there is a case of doubt; that it is not perfectly clear that the man is a free agent, that there may be suspicions on the conduct of the other party; that there is a possibility, and that there may be ground for the conclusion that it was not his own act. That is not sufficient. Mere possibility, or even, to go further, probability, that there may have been such an origin of the transaction, is not sufficient to entitle the Court to set aside this razeenamah. Now we are of opinion that the evidence is not enough, that there is not sufficient to satisfy us and ought not to have satisfied the Court below, and, consequently, we think that the right conclusion has been come to.

The other point that has been taken is, that the question before the Court below, and brought by appeal before us, is, whether or not there was ground for further enquiry, and that the Court below did not give an opportunity to the parties to adduce all the evidence that they were in possession of? Here, again, we are of opinion that the proof lies upon the appellant, and that he complaining that he had not an opportunity of giving his evidence to the Court below, it is for him to shew from these proceedings, that he was ready to produce evidence and offered that evidence, and that the Court rejected it. Now we are of opinion that he has not made out that, that he has not proved that he made that tender, and that the Court rejected it. On the contrary, taking the statement which we have of what took place below, principally from that on which both parties most rely, as well as upon the more formal and distinct account of those proceedings (namely, the statement of the third Judge's judgment), it rather appears that a certain mode of enquiry was pointed out, that a certain mode of taking the evidence was suggested, and that there was, I will not say, acquiescence of the parties in that, for it is not necessary in that case, but that there was no objection by the parties, and that there was no evidence tendered by them which the Court refused to hear. Consequently we are of opinion that upon that ground also the appellant has failed; that he has not satisfied us that he tender-

ed evidence which was rejected; and that, upon the whole, the trial of the question was substantially gone into, the only evidence which he did adduce having been examined by the Court, and he having had the benefit of that examination. Under the circumstances of the case, while we affirm the order of the Court below upon the ground I have stated, we do not think that costs ought to be granted to the parties.

PRIVY COUNCIL.

The 30th November, 1838.

PRESENT :

Lord Brougham, Mr. Baron Parke, Sir T. Erskine, Sir H. Jenner, Sir S. Lushington, and Sir E. Hyde East.

PANDOORUNG BULLAL PUNDIT,*

versus

BALKRISHEN HURBAJEE MAHAJUN.

Mortgage—Equitable Mortgagee.

To entitle a person to claim as equitable mortgagee, it is not sufficient to show that he paid off the original mortgage, but also that it was his own money that was paid, and that he was to stand in the position of the original mortgagee.

Mr. Miller and Mr. Wigram having been heard for the Appellant.

Mr. Serjeant Spankie rose to address their Lordships.

MR. BARON PARKE.—You need not trouble yourself; none of their Lordships have any doubt about the propriety of the decree of the *Sudder Dewanny*.

In this case the appellant shapes his case as equitable mortgagee from *Khatykur*.

He says he has paid off the mortgage at their request, and he was to stand in the position of the mortgagee, as if a real mortgage had been made to him. He has given proof, sufficient perhaps, that he was the hand that paid off the money under the original mortgage; but that it was his own money, or that he was to stand in the situation of the original mortgagee, he has not made out. It depends upon the letter No. 8; he says it is a genuine letter; that fact is not proved; there is no proof brought forward in favor of it, and his own conduct affords a strong argument against him. He made originally a very different case, and

* *Vide 5, W. R. (P. C.) p. 124.*

never said a word about this mortgage for above a year; there is no proof of that document upon which he now relies.

LORD BROUGHAM.—The proof of that letter was a most material point in the case. It was, as Dr. Lushington said, very early made the subject of dispute by the party against whom the claim was made; and whatever may be said as to the informality of these proceedings, you are not to make the want of form on the one side supply the defects on the other side, or make the mere statement, that he was ready to move, be taken as proof that he did make the motion.

The appeal will be dismissed without costs.

PRIVY COUNCIL.

The 30th November, 1838.

SQORIAH Row,*

versus

RAJAH ENOOGUNTY SOORIAH.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Mesne Profits.

Decree of Sudder Court estimating the amount of mesne profits from the average of two preceding years as ascertained in a former suit (the evidence in the present suit being unsatisfactory on both sides), upheld.

ERSKINE, J.—It is not necessary in this case to enter into a consideration of those circumstances which led to the present action, because the whole issue between the parties was, by the conduct of the Court itself, and by the assent of the parties, reduced to this simple question: "The only point to be proved in this case is the precise amount of the net profits of the village of Gorasa in the years Swabhanoo and Tarana." By this their Lordships understand the Court to state that the only question for the parties to direct their proof to was, what was the real value of the property during those two years? or, in other words, what was the amount which the plaintiff had lost in consequence of his not having been in possession of that property to the possession of which he was entitled?

The Court before whom this plaint was first brought was so dissatisfied with the evidence on both sides, that it took the extraordinary course of dismissing the suit altogether, making the plaintiff pay the costs.

* *Vide* 5, W. R. (P. C.) p. 125.

Now, it was obvious, from the evidence before the Court, that the plaintiff was entitled to something, and the Court ought to have ascertained, in the best manner it could, what that something was; it ought not to have made the plaintiff pay the costs when he was entitled to something; but, upon the appeal, the Court of Sudder Adawlut seems to have been dissatisfied with the great mass of evidence given on both sides, and they, therefore, agreeing with the Provincial Court that the evidence was altogether unsatisfactory, and not to be depended upon as to the actual produce, proceed to say,—“What the value of those profits may be, the documents and witnesses in this case will not prove, but it need only be observed that the defendant himself rated the produce of this very village in his suit No. 2 of 1820 in the Provincial Court for the Northern Division, at Rs. 8,132-2 for two years; and the Northern Provincial Court, in their decree in that suit, awarded in his favour Rs. 4,111-11-2 as the value of the profits of the year Pramadi; and according to the plaint, Rs. 8,342-13-7 had been paid to the plaintiff on account of the profits of the two years, Vishoo 1821-2 and Chitrabhanoo 1822-3, up to the date of the decree of the Sudder Adawlut in the appeal suit before alluded to. It may, therefore, very fairly be inferred that the sum claimed by the appellant as the value of the mesne profits of one year, viz. Rs. 4,121-6-9, is not considerably over-rated, if it be over-rated at all.” And then they proceed to adjudge to the plaintiff something less than would be due upon that calculation, after deducting from that amount 1,000 rupees, received by the plaintiff himself. It is impossible for the Court to say that the fact of the defendant himself, or of those under whom the present appellant claims,—that the defendant himself in that suit having claimed the sum of 8,000 rupees for two years before, and received half of it for one year's profit, and there having been double that sum paid into Court for two years' profit,—that those facts did not amount to evidence to guide the Court, and to satisfy them that it was a fair average value, because those years in respect of which that account was taken, were the years immediately preceding 1823 and 1824, the profits of which were under discussion. Without saying what the value of the evidence would have been if there had been any contradictory evidence, or if there had been any circumstances to shew that the value of those years was less than that of the preceding years, or any other circumstances, still it is enough to say that it was evidence upon which the Court might, in the absence of any other proof, found its judgment; and that it was a fair calculation

of the profits of the years 1823 and 1824. The Court has discarded altogether the evidence of the defendant as well as the other evidence of the plaintiff. And if their Lordships, upon looking at the evidence for the defendant, could see that it placed within the reach any means of saying how much less than that sum the produce of the years 1823 and 1824 was worth, they would have availed themselves of the opportunity thus given, of correcting any error into which the Court of Sudder Adawlut might have fallen, in taking the amount of the preceding years; but when the evidence of the defendant is looked at, it really seems to be perfectly valueless, because it depends upon the testimony of two witnesses, Volaty Ramanapa and Volaty Honoomanloo, who state, according to their judgment, what the assessment of those two years actually was; but they are not the persons making the assessment, they had no accounts to produce to corroborate it, and they are speaking at a distance of ten years. The first witness states he is a Mirasdar, or Curnum of Gorasa, from which it would seem he had been the person making out the account; but upon an examination of the evidence, we find he was not the person making out the account, but his younger brother. And all the ground upon which he builds his testimony, that the assessment in 1823 was Rs. 950, and in 1824 Rs. 860, seems to rest upon what he states afterwards as a fact, that he used to see these accounts, when the parties had an opportunity of producing the accounts themselves, and the parties who made the account. The Court cannot receive that as evidence of the fact of the assessment having been to that amount: he did not make it; he borrowed his knowledge from seeing the accounts only, and it therefore is not receivable as evidence of the actual amount of the assessment. The evidence of the next witness is more loose, though he states some knowledge corresponding with the other witness; he had not personal knowledge of it, and very slight means of knowledge; indeed, he says,—“As myself and the Gorasa Curnum, named Volaty Cama Raz, are cousins, and as I used to go to Gorasa occasionally, having a *maniam* there, I understood the above circumstances,” which being translated, means “*he* and I used to talk them over, and that was our understanding.” But where is the cousin,—why was not he called? If it was to depend upon the evidence and the account of the Curnum, why was not he called? Having made the assessment to prove the value, the accounts were not to be the measure of the value, but the knowledge of the person making the assessment would be evidence, and it might be very strong evidence, of what the value was.

These being the only two witnesses who interfered with the conclusion drawn by the Court,—that, as the value of the village was 4,000 and odd rupees in 1819, 1820, 1821, and 1822, therefore, they might presume it was about the same in 1823 and 1824,—it seems to their Lordships that they cannot interfere with the decision the Court have come to, in adjudging to the respondent that account, *minus* the sum he is proved or admitted to have received 1,000 rupees; and therefore the judgment of the Court below is affirmed, but without costs.

LORD BROUGHAM.—The judgment of the Court in the first instance gave costs in the most unaccountable way I ever saw. That judgment was reversed, and costs given to him of the first Court.

MR. SERJEANT SPANKIE.—Yes, my Lord.

LORD BROUGHAM.—He has got the costs of all the three proceedings below, but no costs here.

ERSKINE, J.—No costs of this appeal; I have already observed that the appellant had ample means of proving the actual value of the village, because, upon the death of Nilardy Row, the property reverted to the present appellant, he goes through the whole of the accounts, and an account would be rendered by the Government to him of what was received during the time it was under sequestration.

PRIVY COUNCIL.

The 17th December, 1836.

PRESENT :

Lord Brougham, Sir L. Shadwell, Mr. Justice Bosanquet, T. Erskine, and Sir A. Johnston.

SORABJEE VACHA GANDA,*

versus

KOONWURJEE MANIKJEE.

Evidence—Account-Books.

One party, by merely producing his own books of account, cannot bind the other.

SIR L. SHADWELL.—On the 6th of April 1813, Koonwurjee Manikjee, the respondent in this appeal, brought his plaint in the Zillah Court of Surat against Munjee Bhaee and the appellant Sorabjee, alleging that they had dealings with him, that their account current was regularly adjusted by their Gomastahs up to 1860, and that on the 9th Poos-sood 1862 there was a balance in the respondent's favor of rupees 7,132-1-60.

* *Vide* 5, W. R. (P. C.) p. 29.

His claim against the defendants was for that sum, principal and interest, equal in the whole to rupees 13,689-0-75; from which he deducted rupees 2,125 principal, and 2,070-3-6 interest, making 4,195-3-6, on the acceptance of Hormuzjee Bheemjee who, it was alleged, had not paid the plaintiff a rea, leaving a balance against the defendants of rupees 9,043-4-69. The defendants answered separately. The appellant denied having settled accounts with the plaintiff's gomastah.

In support of his case the respondent produced an extract from his own accounts. Two letters were also put in evidence and some witnesses were examined. The inference from the letters rather was, that there had been separate transactions between the respondent and the appellant; but there was no evidence to shew that the appellant was privy to the respondent's accounts. The Zillah Court, however, on the 24th of May 1815, decreed that the defendant should pay to the plaintiff the sum of rupees 7,132-1-60 according to the dufters of the plaintiff.

The respondent, on the 17th of October 1815, brought another plaint in the Zillah Court against Munjee Bhaee and the appellant, to recover the 2,125 rupees and interest, and on the 26th of March 1817, the Court decreed that the defendants should pay to the respondent the 2,125 rupees and interest. The only evidence in that suit was, that the 2,125 rupees had not been paid to the plaintiff: no additional evidence was offered to shew that the defendants could be bound by the plaintiff's accounts.

The respondent appealed to the Provincial Court against the decree of the 24th of May 1815, because interest had not been allowed him on the sum recovered, and the Provincial Court, on the 10th November 1815, decreed the appellant and Munjee Bhaee to pay the interest which had been disallowed by the Zillah Court, and the costs of the appeal.

The appellant appealed to the Provincial Court from the decree of the 24th of May 1815, but on the 23rd of July 1816 the Provincial Court affirmed the decree.

The appellant also appealed to the Provincial Court from the decree of the 26th of March 1817, but on the 14th of April 1818, the Provincial Court affirmed it.

Upon three distinct appeals to the Court of Sudder Dewanny Adawlut, in two of which Sorabjee was sole appellant, and in the third he and Munjee Bhaee were joint appellants from the three decrees of the Provincial Court, those decrees were affirmed with costs by three decrees, two of the 25th of March 1818, and one of the 12th of May 1819.

The appellant, Sorabjee, has presented his appeal to His Majesty in Council against those decrees of the Sudder Dewanny Adawlut. It is observable that, if the first decree of the Zillah Court were right, its second decree might be right also; for the claim for the sum of 2,125 rupees and interest rested on the same ground as the claim by the first plaintiff, and if those decrees were right, the decree of the Provincial Court upon the appeal of Koonwurjee Manikjee for the interest disallowed by the Zillah Court, might be right; but if the decree of the Zillah Court upon the first plaintiff were wrong, then that plaintiff, as well as the plaintiff in the second suit in the Zillah Court, and the appeal of Koonwurjee Manikjee to the Provincial Court, should have been dismissed with costs.

No evidence was brought before the Provincial Court or the Court of Sudder Dewanny Adawlut, which was not before the Zillah Court, so that the decrees can only be supported, by holding that one party, by merely producing his own books of account, can bind the other. But such a proposition is utterly untenable; and the result is, that all the eight decrees are wrong; that the three decrees of the Sudder Dewanny Adawlut Court complained of must be reversed as to the appellant, but without costs; and not only must the decrees of the Provincial and Zillah Courts be reversed, so far as they direct the appellant Sorabjee to pay principal, interest, or costs, but the two original plaintiffs in the Zillah Court, and the respondent's appeal to the Provincial Court, must, as against the appellant Sorabjee, be dismissed with costs.

PRIVY COUNCIL.

The 7th December, 1836.

PRESENT:

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, T. Erskine, and Sir A. Johnston.

MEER USUD-OOLLAH *also called* SHAH CHAMAN,*

versus

BEEBY IMAMAN, WIDOW OF SHAH KHADIM HOOSSAIN.

Evidence (Test in cases of conflicting)—Registration under Section 20, Regulation XXXVII. 1793—Presumption.

There is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence where perjury and fraud must exist on the one side or the other, than to con-

* *Vide* 5, W. R. (P. C.) p. 26.

sider what facts are beyond dispute, and to examine which of the two cases best accords with those facts, according to the ordinary course of human affairs and the usual habits of life.

The act of registration after a proclamation under Sec. 20, Regulation XXXVII. 1793, amounts to a public, open, and notorious assertion of title on the one side, and the omission to register, unexplained by proof of the ill-health of the claimant, or absence in a distant country, or ignorance, affords an equally strong presumption of the non-existence of any title on the other.

MR. BARON PARKE.—Their Lordships are called upon in this case to pronounce their opinion on a single question of fact with respect to which, however, there is a great mass of documentary and parol evidence on both sides, and conflicting decisions of the Provincial and Sudder Dewanny Courts, between which we are left to decide without much assistance in investigating the truth from either. We must, therefore, determine for ourselves, in the best way we are able, upon the evidence, oral and written, which was adduced on both sides, and which has been laid before us and very elaborately discussed.

The plaintiff, the appellant, seeks by the original suit commenced in 1813, to recover from the defendant a property, of which he was then in possession. This circumstance alone throws upon him the burthen of proof. He was bound to shew to the satisfaction of the Court, that he had a just title to the possession. The nature of the property is not very clearly explained, but it is certain that it had the character of real estate, being a part of the land revenue of a certain district originally granted by the Mogul Government for religious purposes, or rather burdened with a religious obligation, and subject to it, to be enjoyed by the grantees for their own benefit. This property is denominated a muddud mash. It had been undoubtedly in the actual possession of those under whom the defendant claimed, and of the defendant herself, prior to and since the year 1761 down to the commencement of the suit. The plaintiff deduced no title to himself by proof of any conveyance from the original grantees of the Moguls, or from any of the persons who had been in possession; he was obliged therefore to claim on the ground that the possession of the defendant and her predecessors was legally his own, and that the persons in the actual occupation or receipt of the profits were his agents, and received them on his account. The single question of fact was, in effect, the only question in the cause, and the plaintiff was bound to prove the affirmative. The course which he took for this purpose was, in the first instance, to prove by several witnesses payments of money by Meer Gholam Kulleadar, who was in possession prior to and about 1760, and by Beeby Zenut, who subsequently

ly occupied. Those made by her were stated to have been in 1776 or 1777, on the occasion of the plaintiff's marriage, also in 1793 and 1802, and such payments in all amounted to between ten and eleven thousand rupees. He also gave evidence of the expenses of the plaintiff's marriage having been defrayed out of the revenue, and that the ceremony was performed in 1777, when he acted as Malik or owner; and the like on the occasion of the marriage of a son (whether the same or a different one is left uncertain) in 1793 and 1812. One witness spoke to an act of ownership in the plaintiff or his father in 1783, Beeby Zenut having restored, by his order, the witness's father to a house from which he had been removed; and several others deposed to declarations of Meer Gholam Kullendar and of Beeby Zenut on different occasions, and particularly in 1776 and 1777, and even by Shah Khadim Hoossain in 1812, that the plaintiff was the real owner of the mash, and the case was then closed. But in a subsequent stage, and a very short time before the judgment was given, the plaintiff gave mere parol evidence, and produced three letters appearing to be under the seal of Beeby Zenut, each recognizing the plaintiff's title and that of his father, and he exhibited six copies of papers from the Court of Bhaugulpore, one of which purports to be a deed of relinquishment from Beeby Boodhun to Beeby Zenut in 1767, a darkhast or petition from Beeby Zenut for the management, dated in 1762, and a grant of the management accordingly. The last, if genuine, and duly proved, would have been decisive in the plaintiff's favor; but these six documents were considered by the Sudder Court as forgeries, and upon that assumption the decree of that Court was founded. A great suspicion undoubtedly attaches to them. But it is not necessary to discuss the question whether there was sufficient proof that they were actually forged, because, at all events, the *copies* were inadmissible, for there was no evidence of a search for the originals. These six papers must, therefore, be altogether dismissed from the case for that reason, and it must rest, on the part of the plaintiff, on the other documents and the oral testimony.

On the other hand, the defendant called many witnesses to prove that she and those under whom she claimed, acted and were always treated as the owners of the mash, that the plaintiff and his ancestors were never supposed to be so, and several deeds were put in proving a dealing with the property from a very early period. There were two mortgages from Meer Gholam Kullendar in 1756 and 1761, shewing that he was then acting as owners. In 1765 Beeby Boodhun mortgaged the

property. A deed was then put in of the date of 1768, dividing the whole between Beeby Zenut, to whom eight shares were assigned, and Beeby Noorun, who took seven. That both were subsequently in possession was proved by their joining in a lease in 1775, and by one leasing in 1782 her seven shares, and the other mortgaging her eight shares in 1783. This possession of both is shewn by perwannas to have continued in 1786, and is said to be an absolute possession; and there is parol evidence on the cross-examination of the plaintiff's witness, Mahto, and the examination of the defendant's witness, Bux, that both were at one time in possession, for the latter mentions that there were two cutcherries. A conveyance was then proved of Beeby Noorun's share to Beeby Zenut in 1789; after which, in 1791 and 1793, the latter leases as sole owner, and conveys the whole, in 1796, to Shah Khadim Hoossain, her nephew, of whose actual possession in 1794 parol evidence was given; and four leases, two of the subsequent dates of 1799, 1800, and two of 1805, were produced, all purporting to be made by Shah Hoossain alone, and proving that he acted as owner from that time.

From this outline of the defendant's case, so far as I have stated, and without adverting to two important facts, which I shall afterwards notice, it appears that a title is deduced from Beeby Boodhun to the defendant, and confirmed by regular acts of ownership exactly corresponding with the documentary title. On contrasting this case with the plaintiffs, several observations occur in favor of its truth. So far, indeed, as relates to the acts of ownership of Beeby Zenut, it is not absolutely inconsistent with the plaintiff's case, which admits her to be in possession, and being so, she might deal with the state by leasing and mortgaging it as her own: but the acts of ownership of Beeby Boodhun and Beeby Noorun are altogether inconsistent, and cannot be explained upon the plaintiff's hypothesis, and they are very distinctly and satisfactorily proved. Again, the admissions of title sworn to as having been made by Meer Gholam Kullendar and Beeby Zenut and Shah Khadim Hoossain or Borge, are wholly at variance with their solemn acts; for these declarations are said to have been made about the very times that these persons were actually conveying the property as their own, and it is impossible to suppose that, when they were acting as owners, and in their own right, they should be admitting to witnesses that they had no right at all. Much greater credence is to be given to their acts than to their alleged words, which are so easily mistaken or misrepresented. As to the proof of payments, their amount is small

compared to the actual revenue; and it may be true that, considering the connection of the families (for the plaintiff married Beeby Zenut's niece), money has been occasionally sent as an act of bounty, and the expenses of the marriage of the plaintiff may also have been defrayed, in part or in all, by her. But if the proceeds of the *mash* had really belonged to and been remitted to the plaintiff down to the commencement of the suit, which the plaintiff alleges, whatever difficulty there might have been to have proved such payments at a more remote period, there certainly would have been none in giving abundant evidence, in recent times, by numerous living witnesses; but the proof, instead of growing stronger, becomes weaker, the nearer we approach to the present period, and no remittances whatever are shewn to have occurred since 1802.

The restoration of the witness Mahto's father in 1783 by Beeby Zenut, at the request of the plaintiff's father, may have a foundation in truth, without leading to the inference that the father was the *malik*; and it is to be observed that it is at variance with a fact asserted by other witnesses of the plaintiff, namely, that in 1776, seven years before, the plaintiff himself was the owner of the property.

I proceed to the written evidence. The three letters alleged to be from Beeby Zenut are open to much observation; they were brought forward late in the case, after the plaintiff's *vakeels* had closed their cause, the last of them on the very day of the decree, when the opposite party had no opportunity to contest their genuineness, and that was not proved, except by the similarity of the impression of the seal with that of a seal produced by the defendant.

The first of these letters, which, according to the testimony of a witness named Gholam Hoossain, was written in 1793, is addressed to Mahomed Meer as the *malik*, whereas it is proved by several of the plaintiff's witnesses that the plaintiff himself filled that character in 1776. The second, dated 1797, might, if true, have been confirmed by the production of the account therein referred to; and if it had been really written by Beeby Zenut to the plaintiff, it is singular that, after the strong entreaties it contains that the plaintiff would come over on account of her age, infirmity, and failure of sight, he should have permitted her still to continue his agent till her death, which happened nine years afterwards.

The third letter is open to no observation peculiarly belonging to it, but all are very inconsistent with the solemn acts, leases, and mortgages,

proved on the other side on corresponding dates, a lease in 1765 by Beeby Boodhun, in 1793 by Beeby Zenut, and a conveyance by the latter in 1796 to Shah Khadim Hoossain of all his estate.

We should therefore feel little difficulty in deciding on which side the truth lay, if we had nothing else to guide our judgment than the comparison of these conflicting acts and declarations, parol and written, on one side and on the other, but we are not thus confined. There are some other facts which are established beyond all possibility of doubt, and there is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts, according to the ordinary course of human affairs and the usual habits of life.

Now, there were two facts most distinctly established. The first was, that in pursuance of a notice given according to Regulation XXXVII. 1793, Section 20, Shah Khadim Hoossain, in 1797, entered his claim in the public records as the owner of this mash, deriving his title by grant or tumleek-namah from Beeby Zenut, dated in 1796, and no proof was given on the part of the plaintiff that he ever was, or claimed to be, registered as the owner. The second fact was that, although the plaintiff's case proceeded on the ground that Beeby Zenut and Shah Khadim Hoossain were in possession as his agent, and accounted to him for the profits, yet he produced no single account-current or dufar for any part of the time. These two facts, then, being undoubted, we have to consider whether the case on the part of the plaintiff can be reasonably reconciled with them. If that case were true, is it likely that the claimant, who lived fifty or sixty miles from Patna, would have abstained to bring forward his claim on so important an occasion as that which occurred, when the Government called upon all persons having title to property of this description to appear and enter it on public Registers, in order to prevent its being forfeited to the Government? This fact is most important, not because the Registers themselves are at all of the nature of conclusive evidence of title (for the Regulations provide against that,) but because this act of registration after a proclamation amounts to a public, open, and notorious assertion of title on the one side, and the omission to register, unexplained by proof of the ill-health of the claimant, or absence in a distant country, or ignorance, afford an equally strong presumption of the non-existence of any title on the other.

Again, if the plaintiff was for near fifty years the owner, having either the whole of the mash or the surplus of its revenues, after satisfying the supposed religious purposes for which it was given, is it to be believed that he would not have had a regular annual account, at all events some occasional statement, from his agents, of the receipts and disbursements? and we have the means of knowing, from the assistance we receive at this Board from persons conversant with the subject, that the natives are particularly exact in keeping written accounts.

For these reasons we are of opinion that the weight of evidence is in favor of the defendant, and that the claimant has by no means satisfied the exigency of the law, which throws on him the burthen of proof. We therefore affirm the decree of the Sudder Dewanny Adawlut, and we are of opinion that it must be affirmed with costs.

LORD BROUGHAM.—Did the appellants sue in *forma pauperis*?

MR. MILLER.—I am not aware, my Lord.

Judgment affirmed with costs.

PRIVY COUNCIL.

The 8th February, 1837.

PRESENT :

Lord Brougham, Mr. Baron Parke, Mr. Justice Vaughan, T. Eiskine, Sir E. Hyde East, and Sir A. Johnston.

BHAE-CHUND AND KOOSAL-CHUND,*

versus

PURTAB CHUND.

On appeal from the Sudder Dewanny Adawlut at Bombay.

Limitation (Section 13, Regulation I. 1800, Bombay Code)—Offer of Compromise—Residence of Defendant in Foreign Territory.

The offer of a specific sum of money by way of compromise, in no way involving an admission of the justice of the plaintiff's demand further than what may be inferred from the offer of any compromise (an inference which is never permitted), cannot bring the plaintiff within the exceptions in section 13, Regulation I. of 1800 of the Bombay Code, under which a suit is barred by limitation if not brought within 12 years from accrual of cause of action.

The defendant's residence beyond the limits of the E. I. Co.'s Courts is not a good and sufficient cause, within the meaning on the same exceptions, to excuse the plaintiff's delay in suing beyond the 12 years.

* *Vide* 5, W. R. (P. C.) p. 31.

RIGHT HON'BLE T. ERSKINE.—This was an appeal from a decree of the Sudder Dewanny Adawlut at Bombay, which formed the last of a series of proceedings in the Court of that Province upon the question now pending for the final decision of His Majesty in Council.

The first of these proceedings was a complaint filed in the Zillah Court at Surat, in the year 1819, against Roop Chund, since deceased, by the present respondent, Purtab Chund, suing *in formâ pauperis*, in which he claimed, as heir of his late uncle Pana Chund, deceased, the sum of 3,477 sicca rupees, and an equal amount of interest upon a note-of-hand, alleged to have been given by Roop Chund, in the year 1792 to Koorum Chund, the partner of the respondent's uncle, Pana Chund, to secure the amount of the balance then due from Roop Chund to the partnership. After several intermediate proceedings in the Zillah Court and in the Sudder Adawlut, which it is not necessary to particularize (during which the defendant Roop Chund died, and the present appellants intervened, and were admitted to defend the suit), the cause came on before the Zillah Court for final hearing on the 14th of February 1823. The defence set up during these proceedings by Roop Chund, and afterwards by his heirs, was, *first*, that Roop Chund never owed anything to Pana Chund or Koorum Chund. *Secondly*, that the note produced had been fraudulently obtained from the widow of Koorum Chund by the plaintiff, who had no legal interest therein, or right to sue thereon. *Thirdly*, that the supposed cause of action had arisen more than twelve years before the commencement of the suit, and was, therefore, barred by the Regulations of the Company.

In reply to the *first* defence, the plaintiff relied upon the production of the books of account and the note. In reply to the *second* defence, it was stated that, after the death of Koorum Chund, and the respondent's uncle, Pana Chund, he, the plaintiff, came to a settlement of the partnership accounts with the widow of Koorum Chund, who, having received from him her dues, gave him a deed of release, whereupon he took possession of the *duflar* and the note as having the exclusive right to them. In reply to the *third* defence, he relied upon the fact that the note was executed at Poonah, where Roop Chund resided, and that he had never been at Surat since, until just before the commencement of the suit; and further, that Roop Chund on his arrival from Poonah in 1819, had admitted the justice of his claim, and had offered to pay a sum of money by way of compromise.

The widow of Koorum Chund was examined upon interrogatories

exhibited by the direction of the Court, and stated in substance that the note had no reference to any partnership concern between Koorum Chund and the plaintiff's uncle Pana Chuud, but was given for money due to her husband alone, and that the release was executed by her without reading it, and was intended to relate only to charities and other like expenses. That at the time she executed it, she did not give the note to the plaintiff, but that he stole it, together with her books and papers.

The Zillah Court, upon consideration of the whole case, was of opinion that the evidence of Koorum Chund's widow was fatal to the plaintiff's claim, and also that the plaintiff had not shown in proof why the Statute of Limitations of twelve years should not bear upon his case, and, therefore, passed judgment against the plaintiff, and decreed that one-half of the fees of the defendant's vakeel should be recovered from the defendant, and the remainder from any property that might be found to belong to the plaintiff, and the fees of the plaintiff's vakeel should also be recovered from any property found to belong to the plaintiff. The cause was carried back by appeal to the Sudder Adawlut, before which fresh evidence was taken, relative to the several questions raised before the Zillah Court, and on the 3rd of June 1823, the Second Judge, before whom the cause was heard, recorded his view of the case, delivering his opinion, for the reasons therein stated, that the decision of the Zillah Judge should be reversed, and the amount of the note with interest and costs in both Courts should be awarded to the plaintiff below and their appellants, and referred the case for the consideration of the full Court. And afterwards, on the 26th of the same month, the rest of the Court, after considering the documents and proceedings, concurred generally in the view taken by the Second Judge, and determined to reverse the decree passed by the Zillah Court at Surat, and decreed that the sum of 6,954 sicca rupees 3 annas be paid to the appellant by the heirs of Roop Chund, with full costs in both Courts.

Against this decree the present appeal has been lodged, and the case was argued before this Board on the 7th of December last, when the Counsel for the appellants insisted—*first*, that the respondent had made out no right of action against Roop Chuud or his heirs; *secondly*, that, as the supposed cause of action had arisen beyond the jurisdiction of the Court at Surat, and as the defendant Roop Chuud was not resident within it as a fixed inhabitant, but had only come to Surat for a temporary purpose, the Zillah Court had no jurisdiction in the

case; and *thirdly*, that the plaintiff's right of action, if it ever existed, had been barred by the lapse of time.

Their Lordships intimated their opinion in the course of the argument, that the plaintiff's title to sue, unless he had been barred by the lapse of time, was sufficiently established by the evidence, and that as the heirs of Roop Chund had intervened in the suit, and there was no evidence that they were resident at Surat, where Roop Chund had formerly lived, no objection could be raised by them to the jurisdiction, especially as no such point was made by them in either of the Courts abroad, where the fact could have been easily ascertained. It is, therefore, unnecessary to say anything now upon those points, and the less so because their Lordships are of opinion that upon the *third* objection the decree of the Sudder Adawlut must be reversed, and the plaintiff's suit dismissed. That objection was founded upon the first Regulation of the Governor of Bombay, confirmed in Council in August 1800, for the institution of a Court of Justice in Surat.

By the 13th Article of that Regulation, the Judge of that Court is prohibited hearing, trying, or determining the merits of any suit whatever, against any person or persons, if the cause of action shall have arisen twelve years before any suit shall have been commenced on account of it, unless the complainant can show by clear and positive proof that he had demanded the money or matter in question, and that the defendant had admitted the truth of the demand, or promised to pay the money, or that he directly preferred his claim within that period for the matter in dispute, to a Court of competent jurisdiction, to try the demand, and assign satisfactory reason to the Court why he did not proceed in the suit, or that either from minority or some other good and sufficient cause, he had been precluded from obtaining redress. In this case the cause of action arose twenty-seven years before any suit was commenced. Unless, therefore, the respondent can bring himself within one of the exceptions to this prohibition, the dismissal of the complaint by the Zillah Court of Surat must be held to have been right, and the decree of the Sudder Adawlut erroneous. The respondent contended, and the Sudder Adawlut decided, that the case was brought within two of the exceptions—*first*, that the defendant had admitted the truth of the demand; and *secondly*, that the plaintiff was prevented by the defendant's continued residence at Poonah, where the note was given, from procuring a settlement of the bond, and that he had thereby shown that by a good and sufficient cause he had been precluded from obtaining redress.

The evidence upon which the supposed admission by Roop Chund of the truth of the plaintiff's demand rests, is to be found in the depositions of Koosal Chund, Tarar Chund, and of Wugt Chund, Jay Chund, taken before the Sudder Adawlut, and printed in the 23rd and 24th pages of the Appendix D. But when this evidence is examined, it will be found to amount to no more than an offer of a specific sum of money by way of compromise, in no way involving an admission of the justice of the plaintiff's demand further than what may be inferred from the offer of any compromise, an inference which is never permitted, and which in this case would be most unfair, when the action was commenced while the defendant was absent for a temporary purpose from his usual place of business, to which he was anxious to return. Their Lordships, therefore, are of opinion that the facts stated by those witnesses ought not to be taken as proof of any admission by the defendant of the truth of the plaintiff's demand, so as to take the case out of the prohibitory Clause of the 13th Article of the Regulation. The only other ground upon which the plaintiff seeks to be exempted from the effect of the prohibition is the continued residence of the defendant at Poonah. But no evidence is to be found in any of the proceedings to show that the plaintiff might not, by adopting proper steps, have obtained redress in the Mahratta Courts at Poonah. It was stated, indeed, in the course of the argument, that it was useless for a poor man to commence any proceedings against a wealthy opponent in the Peishwa's Court; but their Lordships cannot, in the absence of all proof, judicially assume this as a fact. It was also urged that the decision of the Sudder Adawlut might be taken as evidence of the opinion of the Judges of that Court, who must be presumed to know how justice was administered in the Native Courts, that the plaintiff could not have procured redress there if he had attempted it. But the Second Judge, who alone gives any reasons for the decree, does not assign this as the reason why the plaintiff was prevented obtaining an earlier settlement of the bond at Poonah, and we have upon this fact the opinion of the Zillah Judge the other way. Their Lordships, therefore, are of opinion that they ought not to adopt these vague surmises as a substitute for the clear and positive proof required by the Regulation in question.

If their Lordships had found that, by a train of decisions in the Courts abroad, the residence of the defendant beyond the limits of jurisdiction of the Company's Courts had been considered a good and sufficient excuse for the complainant's delay beyond the twelve years,

they would have considered themselves bound by a practice upon which the plaintiff might have been fairly presumed to have relied, and the case was allowed to stand over for the purpose of enabling the Counsel of the respondent to produce any such decisions, but none can be found. In the absence, therefore, of proof and authority, their Lordships can find no principle on which they can determine that the residence of Roop Chund at Poonah afforded such an obstacle to the plaintiff's earlier redress, as to exempt him from the effect of the prohibition under discussion. The learned Counsel for the respondent relied very much upon a decision in this country, in the case of *Williams v. Jones*, 13, East, R. 439. But the point argued and decided in that case was essentially different from the question now under discussion. In that case, the plaintiff's claim was clearly brought within the express exception of the Statute, but it was contended that his right of action was gone, because by the adoption of the Statute of Limitations in India, where the contract was made, his remedy had been barred there by the lapse of time, and the decision of the Court proceeded upon the ground that as before the Statute of Limitations the plaintiff's right of action in this country had no limit, and as the circumstances of the case exempted it from the operation of that Statute, his remedy could only be barred by the extinguishment of his right: and as the adoption of the Statute of Limitations in India could only bar his remedy there, but did not extinguish his right, his remedy in this country remained unimpaired.

Here the only question is, whether the plaintiff's case brings him within the exceptions; namely, whether he has shown, by clear and positive proof, that either from minority, or other good and sufficient cause, he had been precluded from obtaining redress.

Their Lordships are of opinion that no such case has been made out, and will, therefore, recommend His Majesty to allow this appeal, to reverse the decree of the *Sudder Adawlut*, and to affirm the sentence of the *Zillah Court*.

PRIVY COUNCIL.

The 16th May, 1837.

PRESENT :

Lord Wynford, Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Easinge, Sir E. Hyde East, and Sir A. Johnston.

PETAMBER MANIKJEE,* *versus* MOTEECHUND MANIKJEE.

On appeal from the Sudder Dewanny Adawlut of Bombay.

Evidence (Alterations in instrument)—Practice of Privy Council (in cases of appeal from concurrent judgments).—Statement of a fact by a Court conclusive.

If an instrument on which a case depends, should appear to have been altered, it can not be received in evidence or be acted upon till it is most satisfactorily proved by all the subscribing witnesses at the least and other evidence that the alteration was made antecedently to the signature.

The Privy Council, in cases depending upon facts which have received the concurring judgments of two Courts in India, will not set aside the last judgment unless it can see very clearly that that judgment is wrong.

When a Court of Justice states a fact, that fact is conclusive in the case.

LORD WYNFORD.—This is, in fact, an appeal against two judgments: the judgment of the Zillah Court confirmed by the Sudder Adawlut, the latter Court making no observations, but merely confirming the judgment given by the Court below.

The question depends entirely upon facts, and in a case coming before this Court, depending upon facts which have received the judgments of two Courts in India, this Board ought not to set aside the last judgment, unless it can see very clearly that that judgment is wrong. It must be most completely satisfied it was wrong and inconsistent with the justice of the case, and against the facts. So far from that being the case in the present case, I believe their Lordships in general are of opinion that, if those facts had been presented to us in the first instance, we should have pronounced the same judgment pronounced by the two Courts in India. This case depends upon an instrument I will read:—“I, Motee Chund Manikjee, pass this writing to you, Petamber Manikjee. In the money transaction for the district of Petlad with the Petels Jey-bhace, Samul-bhace, and Wasta-bhace Eshwan-das, the persons mentioned below have shares as follows. Bhut Tricum-jee Wussum-jee has five and a half annas, of which Jumna-das Sunkur-lal and Bechur Joeta have shares. Rutun-jee Kahan-das, who has a shop at Ahmedabad, two annas in the rupee. You have five and a half annas in the rupee, of which I have a fourth share with Jumna-das Sankur-lal and Bechur Joeta. The remaining three annas in the rupee belong to

* *Vol. 5, W. R. (P. C.) p. 53.*

Nursai-bhace Petamber-das's house, in which Rutun-jee Kaban-das has half (one and a half), and you have half of the remaining three annas and a half, and I the other, being three quarters of an anna each. In this house I have a fourth share. As is above stated, sixteen annas or one rupee among four persons." On the back of this agreement a paper was pasted, containing an endorsement in the hand-writing of the respondent: "Was divided whatever sum have been received, each partner taken his share. Besides this, three thousand five hundred rupees (3,500) is due to you by the house at Dahoor, which you can take when the money comes from Poonah, but this money is entered in another book. Until the money arrives from Poonah, I shall give you interest at the same rate as I usually do."—(Signed) Paruk Motee-chund Manikjee.

It appears to be subscribed by the respondent in this case, and it appears to be witnessed by the Pundit Hurry Narain, and it is enough for us to say he has given evidence to prove the signature was formerly affixed to it.

It is further witnessed by other parties, but Hurry Narain is the only one who says he saw the defendant execute that deed; none of the other witnesses say that. It is enough to refer to the judgment of the Court below, without going through the circumstances of the case, for when a Court of Justice states a fact, that fact is conclusive in the case; if a Judge at *nisi prius* states a fact, the Court above will not suffer that fact to be enquired into, but takes it upon his statement.

Let us see what the Zillah Court says upon the subject: "On examining this paper it appears that part of the original paper has been cut off, and four lines just above the signature written on the back of it; these four lines and the signature are written in a different hand-writing from the first part of the document. The Court, in order to have this point well ascertained, thinks it necessary to shew it to some bankers; and a question is put to the following bankers." But I beg to observe, that the Court found that instrument had been mutilated in the manner stated upon their own view of it without the assistance of the bankers, and that in my opinion gets rid of the objection made to these persons being called in, for we get the fact here stated that the instrument had been mutilated, in the manner mentioned, by cutting off a part of the paper, and writing upon it, the paper containing the four lines as it is stated at the back; but as it is printed at the bottom of this paper, it is most material that we should take notice that only one subscribing

witness saw this signed, the other three witnesses did not. I put the Pundit Hurry Narain out of the question. If you attend to his statement, it is clear he did not see it. But I do not give much effect to that, as it is not on oath; but of the four witnesses only one of them saw this paper signed, and putting that witness out of the question, why may not some very important lines have been cut off from the original document? Cutting the paper off entirely, so that the signature which was at the bottom of the first paper might be added by introducing another paper with those four lines upon it, and the genuine signature applicable to a different transaction is appended to this paper, which is in this state, and but for the evidence of this one witness there is no testimony in this cause which goes the length of disproving that circumstance. Now is there any Court in the world that would receive such an instrument cut in the manner that this is, without more satisfactory evidence than has been produced? If a plaintiff produces a bond in this country, or any other instrument which appears to have been altered, the Court will not receive it or act upon it till it is most satisfactorily proved by all the subscribing witnesses at the least, and other evidence, that that alteration was made antecedently to the signature; there is no such evidence here, and this is the whole of the case of the plaintiff below.

There is a circumstance I ought to take notice of: an Ameen of Police says the defendant admitted he was a partner in the house, but I cannot admit that that is sufficient to buoy up an instrument that is beaten down by all the facts that appear.

Under these circumstances, the Court, so far from thinking they have that satisfactory evidence that will enable them to reverse two judgments in India, where the Judges had an opportunity not only of hearing the witnesses, which is a great advantage they have over us in that respect, and where they had an opportunity of saying this instrument, for though an English Judge might not have understood the writing, the manner in which these alterations were made might have given us strong reasons for forming a conclusion with respect to this matter, but under these circumstances the Court is of opinion that the appeal must be dismissed, and as this case on the view we have taken of it is founded in forgery at least, and most likely forgery supported by perjury, we think it ought to be dismissed with costs.

Appeal dismissed with costs.

PRIVY COUNCIL.

The 17th December, 1838.

PRESENT :

Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, Sir T. Erskine, Sir S. Lushington, Sir E. H. East, and Sir A. Johnston.

SOORIAH ROW,* *versus* COTAGHERY BOOCHIAH.

On appeal from the Sudder Dewanny Adawlut of Madras.

Evidence—Mesne Profits (limited to amount claimed.)

The observation that the evidence of a witness proves too much is not rebutted by the suggestion that it cannot be supposed that the witness was suborned, for, if he was possessed of common shrewdness, he would not have overdone the thing and thus have given rise to such an objection.

The Court cannot give more mesne profits than is claimed although a greater amount may be proved.

LORD BROUGHAM.—It appears to us that there is no sufficient ground for setting aside the judgment of the Court below. It is for the appellant to satisfy us that injustice has been done to him by the decree of the Court, and it has been correctly observed, that the case of the plaintiff was scanty in point of evidence,—to which observation an answer has been made by the learned Sergeant and Mr. Moore, that from their situation the evidence of that which was in contest between the parties, namely, the amount of mesne profits, was not so fully within their reach as it was within the reach of the appellant, but that there was on their part evidence enough,—*prima facie* evidence, as we should say here,—to go to a Jury. The other party had to consider how they should meet that evidence. They might have rested upon the defect of evidence; but it being incumbent upon the appellant to show the judgment below to be wrong at the time, we must see what was the nature of the evidence before the Court. The defendant might have left the plaintiff to prevail by the force of his own case, contending that he was not called upon to answer it, unless it was such as if, unanswered, disposed of the case; but here, instead of relying upon the weakness of their case, he has undertaken to rebut it by evidence. Let us look then to the sort of evidence he has produced, and that which might have been expected; and, first, I would refer to the fact of a certain witness not being called upon the part of the appellant, who from his situation must have been well

acquainted with the subject matter—better acquainted than the other witnesses, and with the means of information within his reach. The next point is, with respect to the books; and whatever we may say as to the change of possession of the books in the subsequent stage of the cause under the decree at that early period, when this proof was adduced on the other side these books were within reach—were in possession of the party; and the Court, I have no doubt, proceeded upon this principle, that everything is to be presumed against the party who keeps his adversary out of possession of the property, and out of possession of the evidence, and takes means to keep that evidence in his own possession; the Court, I have no doubt, looking to the circumstances of this case, thought that everything was to be presumed against the defendant; and the proof, on the part of the plaintiff, to be pressed most strongly against him, where he kept the other party out of possession, and received the rents and profits of the estate, and kept the books in which the accounts were recorded, notwithstanding the plaintiff had given the most scanty proof of the rents and profits,—a position to which I do not quite accede. And there is another point to which the Court below must have attended, namely, that the credibility of the witness is shaken by the gross discrepancy, beyond all probability of its being founded in truth, the discrepancy between the two accounts, between four hundred rupees on the one side and upwards of twelve thousand on the other.

The observation one cannot help making upon this evidence is, that it proves too much on behalf of the defendant who gives that suspicious evidence; in answer to which it is ingeniously suggested, as it is often under the pressure of the cause, that it cannot be supposed that the witness was suborned, for that if he was possessed of common shrewdness he would not have overdone the thing, and thus have given rise to such an objection. That is a very tender argument before a Court, and too doubtful to justify the Court in placing any considerable reliance upon it, for we do find, happily for the ends of justice, that men do fall into these inconsistencies, and by means thereof the fraudulent character of the evidence becomes apparent. In the opinion of their Lordships, no reliance can be placed upon that remark to rebut the observation to which it is applied.

On the other point it is necessary to say only one word; the property in question was treated as separate property by that act on the part of the appellant to which we have been referred; that was the only question for our consideration, and upon the evidence we are of opinion that there is no ground to alter this decree. With respect to the damages, the Court have given the amount in the declaration; but it appears that, adding the interest, a greater amount was proved, and the Court was restrained from giving that greater amount only because they could not give more than the amount in the declaration. Considering the circumstances of this case, we cannot avoid giving the costs. It has been very distinctly and very ably argued, and I am bound to say, on behalf of the Court, very succinctly argued.

Judgment affirmed, with costs.

PROPERTY IN LAND, IN ENGLAND AND INDIA

(Being the substance of a lecture delivered by the Hon'ble J. B. Phrear, one of the Judges of the Calcutta High Court, at the Bethune Society, on the 27th January, 1876.)

On inquiring into the growth of proprietary rights in land, we find the joint-family at its very origin. The village was at first, and still is in a large degree, a group of such families, often all sprung from or appendant to a central family. They were seldom, however, even from the very outset, all of equal rank.

The mode in which this came about may be taken to be pretty accurately ascertained, for the founding of a new village in waste and unoccupied ground has always been a not uncommon occurrence. In the days of Manu, according to the Institutes, it was quite probable in any given case that persons might be alive who remembered the foundation of the village; and at the present time every settlement report sent in to Government will be found to furnish instances, and to describe the circumstances, of newly created agricultural communities. We shall hardly be wrong if we assume that the process which we see in operation now-a-days does not differ essentially from that which gave rise to the village in archaic times. I imagine that one or two enterprising persons more or less connected together by ties of relationship, started the little colony. Of these, doubtless, one would, in some special manner, be leader, and would together with his family after him maintain a pre-eminence in the new society. Next would come the family of the man who was the leader in, or who became charged with the care of, religious matters.

Very soon other persons would be allowed to cultivate land, and to have place within the ambit of the new settlement upon terms as to the situation of their allotment, performing work on the land of the leaders, and other conditions of subordination. Others again would merely obtain the comparatively civilized shelter afforded by the village against the perils of the outside wilderness, pursuing therein convenient handicrafts, or performing servile tasks.

Land was not conceived of as the subject of property in the modern sense, or as belonging to any individual. Each village had its bounda-

ries, which early came to be most precise, and the entire space within these belonged to the whole village. Every family, however, appropriated to itself or became the owner of the homestead which it occupied, and the garden or orchard attached thereto, and often too its particular tank. So much of the land within the village boundaries as was needed for cultivation was apportioned among the recognized families. At first this was done merely for the year's tilling, then at longer intervals, and later still only on the occasions of considerable changes in the families, and so on. The grazing ground, the waste, and the wood-land (or jungle) was common to all alike. In the early days of village civilization, the agricultural element was comparatively small, and it was both easy and advantageous that the culturable plots should be changed, as just mentioned, at more or less frequent periods. As, however, larger areas came to be taken into cultivation, and increased skill and labour to be applied to the reclamation and culture of the soil, and non-annual crops to be growing, it followed naturally that the different families ultimately got to retain permanently in their hands either the whole or the better portion of their respective allotment.

The cultivation of the family plot was effected as a rule by the members of the family alone. But the leading family and the priest family, no doubt, from the beginning inherited and enjoyed much prestige and priority of consideration which enabled them to attain to a position of privilege. They seem generally to have cultivated more or less by servants or by the means of *batai* agreements. And it is not improbable that, originally at any rate, their servants and *batai* occupants were drawn from the, so to speak, interloper portions of the inhabitants of the village, *i. e.*, those who could not claim their part in the village soil by derivative rights from the founder.

Thus there grew to be, even from the commencement, a gradation of respectability and employment within the village itself; and it is very noticeable that there were two privileged heads of the village, secular and religious.

As population increased and became more fixed, the cultivation of cereals and pulses became more necessary and engrossing; and the value of cattle became greater, as being both the cultivating power and the means of exchange. For reasons already suggested, the recognized founders' family and the priests' families, doubtless, obtained advantages in the allotment of *khetts*, both in regard to situation and quantity, and became the wealthiest members of the community, *i. e.*, possessors of the

largest herds, and cultivators of the biggest *khets* with the least expenditure of manual labour. They were also the principal guides and directors of village affairs. And so it came about that to own and look after cattle (the symbol of wealth) was respectable, and (so to speak) the occupation of a gentleman, as distinguished from the manual labour of the field.

After these we have the remainder of the families entitled as of old right to participation in the village lands, and essentially agricultural in occupation. And then there is the class of relative strangers or outsiders, namely, artisans and petty traders, followed by a servile class, hewers of wood, drawers of water, scavengers, &c.

Thus far we encounter no indication that any real approach has been made towards personal *property* in land. We have found that each family in time got the right to retain continuously year after year its own particular plots for cultivation; or at any rate did so for those which they had respectively by special pains reduced from waste, or which had other peculiarities; and we have arrived at the conclusion that the leading families, out of all the families entitled to the village lands, got the best of it in these particulars. Subsequently, again, as families broke up, it came to be acknowledged that the members of each had a right to distribute among themselves the family *khets* for cultivation.

But still the proprietary conception went no further than this, namely, that the particular plot of land which the family or individual claimed was that part of the village land which he or it was entitled to cultivate, or to have cultivated for his own benefit.

A further development of the social system, and a new source of land rights, was brought about by the attrition of village with village.

The exclusiveness of the Aryan family was its marked characteristic. In the earliest beginnings to which we can get back, to use the words of a recent historian of Greece, "the house of each man was to him what the den is to the wild beast which dwells in it; something, namely, to which he only has a right, and which he allows his mate and his offspring to share, but which no other living thing may enter except at the risk of life."—1, Cox's *Greece*, p. 13. The same spirit can be perceived animating the Hindu family throughout all its stages, even down to the present time; and so it was necessarily the governing principle of the group of families which constituted the village, in its relation to its neighbours as soon as it had any.

Each little colony or *abad* held itself aloof from and independent of all others; jealous of its rights, and quick to resent, as well as to defend itself from encroachment. And as villages thickened causes of quarrel increased—pasturage grounds—reclamations—profitable jungle tracts—fuel—thatching grass—bamboo clumps, &c., &c.—until at last, it may be said, the normal relation between the *abads* was one of chronic hostility.

Collision on these points led to fights in which, no doubt, the head of the leading family in the village was the director, and the different members of that family, both from their position and from their comparative independence of manual occupation, were the principal actors.

The common consequence of these fights was that the successful party not merely vindicated its own rights, but seized and occupied some of the best lands of its antagonist, and carried off his herds, and so on. And as in those early days fighting was mainly an affair of personal prowess, these acquisitions were appropriated by those whose strong arms had won them. The conquered *khets* came to belong, in a new sense, to the leader of the expedition, and those to whom he awarded them. And we may safely assume that he appropriated to himself the lion's share of the captured cattle. Thus was introduced a peculiar cause of aggrandisement of the leading family and its adherents. Already distinguished by family blood, by wealth, and by hereditary position and partial immunity from hand labour, they now acquired great additional wealth from the outside, became possessors of *nij* lands in foreign villages, and above all became invested with that personal influence and authority which attaches to successful fighters. The beaten villages, at first probably, only suffered the loss of the appropriated *khel* and of the stolen herds. But this must have had the effect of impoverishing some of its inhabitants, and of increasing the numbers of the dependent population. So that the invaders would at once find it easy to enforce or procure the cultivation of their newly-acquired lands upon *batai* terms. But cultivation by servants, or on *batai* conditions was not in itself novel; it was only extended as the result of these proceedings. The really new ingredient of tenure which came in through them was the complete independence of the village community even in theory which characterised the victor's retention of these lands.

Results such as these, of course, tended very soon to give rise to fighting expeditions, for their own sake, and upon an enlarged scale. Time and distance were involved in them; and the fighters had then to

be maintained while away from home. At first this would be managed out of the principal man's wealth: he assigned portions of his land to the more prominent among them, generally on conditions of service, and supported others out of his own stores, flocks, and herds. Then the non-fighters of the primary village would contribute rations in kind. And next, perhaps, even before this step, each subdued village would be made to pay a permanent tribute of produce in kind.

Here we have before us the growth of a chieftainship and a fighting class, mostly sprung in the first instance from the village founder's family, but also including others who had won their place by the side of these through strength of arm. And when in this way an energetic and relatively powerful family had won supremacy over many villages, its head became a hereditary local Chief, and the fighting men constituted a diminutive aristocracy, most of them actually and all reputedly of the same blood as the Chief. The causes which led to this development were of universal operation; and so sooner or later, all villages fell under this kind of dominion, and the originally free *abads* became subordinated in groups to Chiefs and Rajahs. Also the Chiefs and Rajahs with their several little attached aristocracies, each hereditarily separate from their people, came to be collectively regarded as a noble military governing race, such as the Rajpoot of historical times. If the celebrated *Kshatriya* caste ever had more reality than belongs to mere mention in Brahmanical pages, it (and it certainly has no reality now) doubtless arose in this fashion. (See Growse's Mathura, Appendix A.)

Similarly, from those of the original settlers, who discharged in each *abad* the functions of priest and moral teacher, came the great clerical race-caste of Brahman. They were in the first instance generally, no doubt, closely connected with the head of the colony himself, and like him obtained advantages in the allotment of land, and in getting it tilled for them. Thus freed from the necessity of manual toil, and devoted to the humanizing pursuit of religion and advancement of knowledge, they ultimately came to constitute, by hereditary separation, a singular class of aristocracy,—seldom wealthy, but always of vast influence in their several communities.

As their generations widened, their increasing wants were met by assignments of land made by the Chiefs and others.

And being the repositories of all learning, and in possession of priestly powers, as society progressed, they gradually monopolized all that existed in the way of public offices, and attained an importance,

which as a rule much exceeded that of an ordinary member of the fighting or warrior class, and closely approached that of the Chief himself. The aggregate of these everywhere were *Brahmans*. It is possible that out of the same materials a third hereditary class, also reputed to be of pure and unmixed descent from the founders of the settlement, may have developed itself and acquired a social status of privilege. For it is conceivable that besides the fighting men and the teachers, some few others of the original settlers or their descendants may by good fortune in husbandry or likely enough by joining trade therewith have contrived to distinguish themselves in wealth above their fellows, and to free themselves from the toil of agricultural labour; and may at the same time have avoided the ranks of the Chief's adherents. I confess I think this last supposition extremely improbable, for in the stage of civilization which is here being considered, an unlettered man of leisure and wealth could scarcely have found a respectable alternative to that which for want of a better term we may call the profession of arms, and which must have been looked upon as the gentleman's occupation. If, however, such a segregation could have originally taken place, and if notwithstanding the want of the discriminating force which is incident to a community of employment, purity of family blood could be maintained in this body, then like the fighting and the clerkly classes it would enjoy an aristocratic pre-eminence, and would answer to the caste which has been described by Brahmanical writers under the designation *Vaisya*, but whose existence, so far as I know, has never been otherwise evidenced.

The great bulk, however, of the descendants of the original settlers (speaking of villages in the mass) were unable to rise above the common level, were less careful of purity of blood, or of preserving any mark of descent from the immigrant race. With them gradually came to be intermixed people of all kinds, aborigines, run-aways from other *abads* from cause of pauperism, feud or otherwise, some of whom came to be even allowed a portion of the village lands.

The social development which I suppose to have been thus effected may be concisely and roughly described as follows:—

(1.) The immigrant and growing population in each different tract or district of country, although made up of village units, in course of time acquired as a whole a certain homogeneity of physical appearance and of character, peculiar to itself, being the product of various influences, such as circumstances of the district, general habits of life of the people, infiltration of foreign ingredients, and so on.

(2.) A hereditary aristocratic class rose to the top of each community or people (so distinguished), and established over it a domination which bore characteristics resembling those of feudalism in Europe.

(3) And a clerkly class in substance, hereditary known everywhere as the Brahmans, in like manner came into social pre-eminence, and managed to appropriate to itself the influence and authority of the priest and the teacher.

I may venture here to say (though my opinion in itself is worth very little) that I quite agree with Mr. Growse in thinking that there never was at any time in Indian Aryan society a hereditary *Vaisya* class; and as I have already mentioned, I cannot perceive in the conditions under which I imagine that society to have been developed any cause adequate to its production. Probably the *Brahman*, *Kshatriya*, *Vaisya*, and *Sudra* of the Brahminical codes were only the Utopian class distinction of a prehistoric More.

Although there may be some difficulty in conceiving the exact nature of the process by which the result number (1) is produced, there can be no doubt, I apprehend, that in some stages of society, at any rate, it is a reality of very active operation. In quite recent times, we have under the designation of Yankee an instance of the origination by immigration into a new country of a novel and very distinct type of people, marked by physical and intellectual characteristics of the highest order.

And a glance over the ground which is covered by the Aryan race in India will show that while there can be no question as the community of race character possessed by the different populations, there has also been at work upon them respectively strong local influences and special modifying causes. To take large divisions, it is impossible not to see that the population of the Punjab differs uniformly and materially from that of the Kumaon, and similarly the latter again from the populations of Bengal and Orissa. I will make no endeavour now to seek out these influences and causes for each case, because to do so would carry me somewhat wide of my present purpose.

On the theory put forward the two privileged classes (2) and (3) ought to be distinguished from the commoner local population by such marks as purity of descent (*i. e.*, descent preserved from the freer intermixture prevailing around), together with the relative elevating habits of a leisured life can confer; and yet should participate with that popu-

lation in the general characteristics which serve to separate them from the populations of other localities. And that this is so in India is, I think, as a rule, abundantly apparent. In the Chapter of the Star of India lately held in Calcutta, the small groups of noblemen who stood around, say for example, the Maharaja of Patiala, the Maharaja of Gwalior, and the Maharaja of Rewah, respectively, were as markedly different from each other in feature of countenance and bodily proportions, and could be as readily recognized separately, as if the comparison were made between them and the like number of Englishmen. And the same assertion may be made relative to the Brahman. The general results in regard to rights of property in land, of the social progress, and course of change which I have endeavoured to represent, were very simple.

The village community stood out with great distinctness as a self-governing agricultural corporation. Every family in it, except those which were purely servile or which had never become recognized as sharers in the customary rights, had its allotment of village land for cultivation; it had also the right to pasture its cattle over the belt surrounding the village, and on other pasture grounds of the village if any; and a right to take what it wanted of the jungle products within the village limits.

The local Chieftain had a portion of lands in *all* the villages subordinate to him which was in a special manner his own, and was additional to the substantial share which he had of the communal rights. The other members of the warrior class often had, besides their own village lands, an assignment of land from the Chief in some village, not necessarily their own, which they held in more or less dependence upon him. And the Chief, further, had a tribute of a certain portion of the produce of every village allotment (exclusive of those of the Brahman and the warrior) which he could use as he pleased for the support of himself or his followers, and which he often no doubt assigned pretty freely to favorites and others on conditions of service and otherwise.

The Chief and the other members of the warrior class (or feudal aristocracy) and the Brahman seldom or perhaps never took any personal part in cultivation. They either tilled their lands through servants, or oftener allowed other persons to occupy and till them upon condition of yielding up a portion of the produce, they themselves probably (at least in the earlier days of the practice) furnishing cattle, seed and other agricultural capital. And arrangements of this kind could be altered by the persons concerned at their convenience. But the land allotment

generally was an affair of the village, and although the ordinary village cultivator was obliged to pay tribute in kind in respect of his share to the Chief, he could not be disturbed in the possession thereof by him. There never was, so far as I can discover, any assumption on the part of the Chief of a right of possession in respect of the cultivators' share of the village land or of a right to disturb that possession. And all question of right and all disputes within the village were settled on a basis of custom and equity by the village panchayet, wherein the Chief either in person, or represented by a superior servant, had a voice. In all this there is at most conceived only the right to cultivate land, and a deputing of that right to another in consideration of a share in the produce. And little or no approach had up to this stage been made to the idea of property in land as a commodity, and of power to alienate it, or even to hire out the use of it for a money payment. The Chief was in a sense lord of the villages which were subordinate to him, and entitled to a share of the produce from every cultivator therein; but he was not *owner* in the modern English sense, and had no power to dispose of the possession of any land except his *nij* land, and with regard to this he only had the right to cultivate by himself or by his servants, or to get somebody else to do it on condition of dividing the produce. No other practice was known or thought of, and in early stages of society, practice, or custom precedes and is the measure of right.

At first sight the distinction which I am endeavouring may appear to be without a difference; the produce of the land ~~must~~ have been in effect divided much in the same way between the cultivators and the Chief who took tribute in kind as if the parties were true landlord and tenant. But on looking closer it will be found that the two relations differ very materially, and that the one I am dwelling upon is anterior to the latter as a matter of progress. It is especially important to remember that the share of produce, which the Chief could take was not regarded by his own pleasure, or by the making a bargain, but by custom, or practice in regard to which the village panchayet was the supreme authority. And that the Chief had no power to turn the cultivator out of possession.

When these quotas of produce were in the course of progress turned into money payments, or their equivalent, they still did not become rent paid for occupation and use of land as an article belonging to and at the disposal of the person paid, but were dues payable to a superior ruling authority by the *subjects* of that authority. The Chief, though ze-

mindar of *all* the land within the zemindary, was at most landlord (and that in the very qualified sense of one merely having the right to dispose of the occupation and tilling of the soil) of so much of it as was his *nij* land, and in some instances probably of the wastes. The machinery of this system was the zemindar's *kachahri*, the centre of local authority, side by side with which was the *panchayet*, *i. e.*, the old *abad* self-government.

I am unable to adduce the direct evidence of any historical writer in favour of this view, but there is a good deal in the old codes which tends to support it indirectly.

In Manu, not a very ancient writer, though probably as old and respectable an authority as we can go to, there is nowhere any mention of land as a subject of property in the modern English sense. Private ownership of cultivated plots is recognized, but it is simply the ownership of the cultivator. The land itself belongs to the village. There is no trace of rent. The owner is only another name for cultivator. He is indeed under obligation to cultivate lest the Rajah's or lord's dues in kind be shortcoming. But he might cultivate by servants, of whose doings he knew little or nothing, or arrange with some one else to cultivate on a division of crops (*i. e.* the *batai* system, a form of metayer.)

In another place of Manu we find every one enjoined to keep a supply of grain sufficient for his household for three years. And it is evident that almost everybody is supposed to be an actual cultivator.

Although the practice of *batai* is very like the small end of a wedge, which might have disrupted the primitive system, yet it did not in fact lead to the letting of land; and *rent* in any form seems to be altogether unknown to Manu.

Selling of land, or even of the use of land, does not seem to be anywhere directly alluded to. Contract of sale in some variety is spoken of, but nowhere, so far as I remember, in immediate reference to land. Appropriating a field, giving a field, and seizing a field, have all a place in Manu's pages, but not buying or selling a field. The passage in p. 303 s. 114 of Sir W. Jones' translation (quart. ed.) when rightly rendered, does not give rise to the inference that land was there contemplated as a subject of purchase.

Somewhat later in time, no doubt, according to the *Mitakshara*, separated kinsmen had acquired uncontrolled power of disposing of their respective shares of the family allotment. This, however, did not amount to a dealing with a specific portion of land as a thing of property, but

was a mere transfer of a personal cultivating right, incidental to personal status in the village community, and subject to an obligation to render to the lord his share of the produce. And for this cause it was necessary that the transaction should be accompanied by specified public formalities: and an out and-out, sale was discountenanced except for necessity. Moreover, when the transfer was not absolute, but conditional by way of security for repayment of a debt, it always took the form of what is now called a usufructuary mortgage.

It seems to me pretty clear that the usufruct of land by actual tillage on the footing of a right of partnership in the village cultivating community, and not the land itself, constituted the object to which the words of ownership occurring in the Hindu law writers relate.

The same story is brought down to modern times by copper plates of title, old sanads, and other evidence of the like kind. These disclose the pretty frequent grant or assignment of the right to make collections and other zemindari rights made by a superior lord, or the gift of a plot from the waste, or out of the zemindar's *zeraiat*, to a Brahman or other deserving person. But I know of no instance of private transfer by purchase and sale of actual land, or of the lease of land in consideration of a rent.

The land system at which we have thus arrived is one of power or authority and subjection, rather than of property; and I may venture to say generally that it is the zemindar and raiyat system of Aryan India at the present day.

I have not now the time to illustrate this proposition adequately by examples. The state of things in Bengal has been so affected by direct legislation, and the spread of English real property notions, that I cannot appeal to it for this purpose without more explanation than I have here space for. But I will venture to say that Mr. La Touche's very interesting Settlement Report of Ajmere and Mhairwarra, recently published, supplies facts which serve to establish it for that district, notwithstanding that Mr. La Touche very often uses language which broadly declares the State's *right of ownership* in all the lands constituting the territory of the State. Mr. La Touche, I admit, appears to employ these words "right of ownership" in their widest English meaning; but I do not think that his facts require anything nearly so large. In his first passage on the "Tenures" of Ajmere, he says: "The soil is broadly divided into two classes *khalsa* or the private domain of the Crown, and land held in estates, or baronies by feudal Chiefs originally

under an obligation of military service," and I cannot help thinking that he has been misled by an analogy which his phraseology borrowed from feudal Europe suggests, and which, to say the best of it, is only imperfect.

As I understand the report, the general result may be stated thus : certain members of the village community enjoy the permanently cultivated or improved lands of the village by some recognized hereditary or customary right of cultivation, which is sometimes termed ownership and sometimes proprietorship. That if they pay the customary share of the produce to the person entitled to receive it, they consider themselves entitled to continue undisturbed in the occupation and cultivation of their land, or even to transfer it to another. That there is no such thing as the letting of land on terms of profit. That private sales of land are practically unknown, and that the sale of land by the Civil Court (an English innovation) has been prohibited because it is so opposed to ancient custom as to be incapable of being carried into effect. That mortgages are almost all of an usufructuary kind, and in Mhairwarra there is a kind of metayer system established between the mortgagor and mortgagee. That the State, as representative of the former superior Chief, collects the revenue (which is the modern equivalent to the old *customary share of the produce*) from the cultivators by certain agency machinery, and exercises other recognized chiefs' rights, except over lands in respect to which the Chief's rights to collect dues and otherwise were assigned by him to minor Chiefs, designated as istamrardars or jaghirdars, on conditions of military service, or for other consideration. That amongst the rights so exercised by the State and its assignees, was the right to dispose of waste land. And, finally, that although within the State area of collection the revenue is settled in the form of a money payment, in all jaghir estates the revenue is collected by an estimate of produce and money assessments are unknown.

If this concise statement of facts, drawn from Mr. La Touche's report, be approximately correct, as I think it is, provided the report be read cleared of expressions, which seem due merely to Mr. La Touche's implied theory of original State ownership, it accords singularly well with and justifies almost to the word the proposition which I have just ventured to make.

And this example is the more forcible, because Mr. La Touche says that "the land tenures are as might be expected entirely analogous to those prevailing in the adjacent Native States," an assertion which the result of my own personal inquiries enables me to confirm.

But the relation between the Indo-Aryan land and the modern form of absolute right of ownership of land which obtains in England will be best explained by drawing attention to the point at which the latter proceeded, or diverged from the former.

In Europe the course of change from the initial joint family village onwards was at first much the same in character as that which occurred here, but it early exhibited a very remarkable difference. In the conflict of villages the strongest party did not limit itself, I imagine, as appears to have been the case in the East, to making appropriations from the waste, and to imposing a produce tribute on the cultivators of the defeated village, leaving them otherwise undisturbed in their possessions, and the management of their village affairs, but it turned the cultivators out of their land, taking the cultivation into its own hands and reducing the former cultivators to the condition of labourers or serfs. The root of the village government and administration was thus destroyed; and in the place of the produce tribute was substituted a dominion over the soil—a difference which was all important and pregnant with the most weighty political consequences.

There was still, I conceive, at this stage no idea of ownership of property in land other than the idea of right to cultivate, no idea of right to land independent of the purposes of cultivation or other use of it. Thus the dominant party, by its leader and chief, took over the cultivation, distributing it probably in parcels amongst themselves, the Chief no doubt ultimately getting by far the largest share, and being especially the authority to distribute, while the subjected people became bound to labour for their masters, and on this condition were allowed to retain or occupy a homestead—and so to speak subsistence—plot of land. From this beginning grew up the manor corresponding in some degree though remotely to the oriental mouzah. The lord's demesne or cultivation comprised the bulk of the land, or at any rate the best of it; some portions of land became the cultivation of free men of the lord's race or belongings allied to him by military ties and by blood, and the rest was the subsistence land of the serfs, bound to labour on the lord's land. From this again at a later period the copyhold tenures developed.

But meanwhile and for a long time the lord was only owner of his land in the sense of cultivator and user of it. He cultivated his land in his various manors through the intervention of a bailiff in each manor. In the course of social and economic change, the expense of this vicarious management became so great as to leave little or no profit for

the lord, and a new expedient suggested itself. The bailiff was dispensed with and the cultivation of the land was given out in portions to the more substantial serfs and others, on the terms of the lord providing the cattle, implements, and other cultivating capital (including seed grain), and the cultivator (now become farmer) remunerating the lord partly by money payments and partly by a share of the produce.

In some parts of Europe this led to a permanent metayer system, but in England it did not last long. The farming class speedily acquired capital enough to find themselves in cattle, &c., and to take in hire the cultivation or use of the land for a simple annual payment of money, *i. e.*, rent. And thus the ownership of land became permanently distinguished from the use and cultivation of it under contract with the owner; and the landlord and farmer became two grades of persons dealing with the same commodity, namely, the owner of it unskilled in using it, and the hirer of it for use.

On the other hand, those serfs who did not succeed in rising to the position of the farmer in the end sunk to be mere labourers, subsisting solely on wages earned by doing for the farmer and under his directions and control, the manual work of tilling the soil.

As long as right to land was inseparably associated with personal use of it, there was no thought of alienating it at the will of the person to whom the use belonged, but when it became a mere commodity, which was only valuable for as much as it would bring on being let out, then of course it also became freely alienable like any other commodity.

This stage has never been reached in the course of the purely oriental development. It is, however, hardly too much to say that the tendency of the natural economic and social forces of the country if allowed free play and given time would have been to make the land a commodity in the hands of the village cultivator or perhaps even of the mahajan rather than in those of the zemindar. But in Bengal the permanent settlement which gave an artificial right to the zemindars and the English civil courts which recognize the power of alienating every personal right capable of definition, have introduced disturbing forces of immense effect; and it would be rash indeed to attempt to foretell the ultimate result which may be expected in the course of progress if the Legislature should not again interfere. All that can be safely said is that the present is eminently a period of transition. The political consequences to which I just now referred would alone afford a very large subject for discussion. In the East, under the village system, the

people practically governed themselves, and the contest for power among the Chiefs of the noble class was mainly a struggle for command of the *Kachahri tabils*, the contents of which were spent in personal indulgence, royal magnificence, and splendid monuments to the glory of the successful competitor. In the West, such government of the people and administration of public affairs as there was fell to the lord and his courts. There were no collections, and a great portion of the means of maintaining and working the machinery of authority had to be obtained by some system of levy and taxation. These two differing sets of conditions led necessarily to intrinsically different political developments.

CALCUTTA HIGH COURT.

The 3rd June, 1875.

PRESENT:

The Hon'ble W. Markby and the Hon'ble H. B. Lawford, *Judges.*

ISHUR KHAN BHADOOREE AND OTHERS, *Petitioners.*

Act XX. of 1865, S. 11.—Mookhtears—Civil Courts.

Sec 11 of Act XX. of 1865 does not empower *Mookhtears* to make applications in Civil Courts.

MARKBY, J — The petitioners, in this case, who are *mookhtears*, state that one among their number presented an application for execution under Section 207, Act VIII. of 1859, on behalf of his client decreeholder in the Moonsiff's Court at Boalia, but that the Moonsiff returned the application upon the ground that it ought to have been presented through a pleader, and not through a *mookhtear*. The petitioner then applied to the Judge, but the Judge refused to interfere. And the present application is made to this court substantially asking us to issue an order upon the Moonsiff to receive the petition.

Now, the application which it was desired to make is one which, under Section 207, must be made to the court. Section 207 says: "When any party, in whose favour a decree has been made, is desirous of enforcing the same, he shall apply to the court * * * *." In substance, therefore, the present petition is that we should issue a direction which would have the effect of enabling *mookhtears* to make applications to the courts in the mofussil. Section 16 of the Civil Procedure Code provides that "All applications to any Civil Court, and all ap-

pearances of parties in any Civil Court, except when otherwise specially provided by this Act, shall be made by the party in person, or by his recognised agent, or by pleader duly appointed to act on his behalf.' The *mookh-tear* in this case does not claim to be a recognised agent; he does not base his right to make this application on the ground that he is a recognised agent, but on the ground that, as a *mookh-tear*, he has a right to do so. It is quite clear that no such right is given to a *mookh-tear qua mookh-tear* by Section 16. The applicants, however, contend that the right is conferred by Section 11, Act XX. of 1865, which provides that pleaders may appear, and plead, and act in the courts therein named; and that *mookhteers* may appear and act in any Civil Court, whereas they may appear, plead, and act in any Criminal Court. And it is argued that the making of an application under Section 207 comes within the words "appear and act."

Now, in determining what part of the proceedings come within the words "appear and act," and what part of them come within the words "appear and plead,"—in other words, in considering what distinction the Legislature intended to draw between *acting and pleading*, we must look to what has hitherto been the practice of the courts in this country. The parties who make this application do not state in their petition that the construction which the Moonsiff has put upon this provision, differs in any way from the construction which has been hitherto put upon it since the Act came into operation. And as far as we are aware, the practice hitherto has been for applications of this kind to be made not by *mookhteers* but by pleaders. That alone would make us hesitate a good deal before we interfered with the order of the Moonsiff. But it also appears to us that the construction which the Moonsiff has put upon these words by his order, is the same which has been put upon the same words for many years on the original side of this court. There the advocates are by an express rule restricted to pleading (rule 12, at page 26 of Mr. Belchamber's collection of rules). And the attorneys of the court are allowed, except in special and exceptional cases, to appear and act. And yet it has always been the practice on the original side to exclude attorneys from making any applications in court, and to allow the Advocates, who have only the right to plead, to make such applications. Whether it is strictly correct to call the making of an application to the court on behalf of a suitor, pleading or not, may possibly be open to question. But when both the courts in the mofussil and this court in its original jurisdiction have for a long series of years, attached

a particular meaning to that expression, a division bench of this court would not be justified in setting that construction aside.

It has been argued that a distinction may be drawn between applications which are generally merely of a formal character and applications which required an argument to support them. But no authority or precedent for making any such distinction has been adduced, and it seems to be pretty manifest that it never can be certain until an application is made and granted whether or no any argument will be required in support of it, and we may, we think, say that, as a general principle, a party who makes an application must be ready and qualified to support it if the court calls upon him to do so.

It appears to us, therefore, that upon the proper construction of Section 11, Act XX. of 1865, upon which and not upon the Procedure Code this question turns, the decision of the Moonsiff was right, and that the District Judge was also right in refusing to interfere with that order, though at the same time we must say that we do not rely on the argument which he used, in refusing the application. It is not because the *mookhtear* is only to act as a *mookhtear* that we refuse to interfere, but because we consider that upon the construction which has been given to the word "plead," what the *mookhtear* was desirous of doing in this case does come under that term. The application will therefore be refused.

CALCUTTA HIGH COURT.

The 19th May, 1875.

PRESENT :

Mr. Justice L. S. Jackson and Mr. Justice McDonell.

DEEN DOYAL PORAMANICK* (Defendant) *Appellant*,

versus

KYLAS CHUNDER PAL CHOWDRI and others (Plaintiffs) *Respondents*.

Contract—Hindu Law—Interest.

The rule of Hindu law, prohibiting the recovery of interest exceeding in amount the principal sum lent, is not applicable to suits brought in Mofussil Courts in Bengal.

JACKSON, J.—The two questions raised in this appeal, which are of most importance, are, first, whether compound interest stipulated by the instrument on which the plaintiffs sue will run beyond the due date,

* *Vide* 1, Indian Law Reports, Calcutta Series, p. 92.

which is the end of Choitra 1275; and secondly, whether, with reference to the Hindu law, the plaintiffs and the defendant being both Hindus, a larger amount of interest than the principal can be recovered. As to the first question, we can have no doubt, I think, that the terms of the bond appear clearly to import that there was to be payment of interest in two instalments,—*viz.*, a half-yearly and yearly payment, the word *सालवार* including not only the particular year which was to elapse before the amount was due, but each year until the whole sum was recovered. As to the second point, no authority has been laid before us to justify our adoption, for Courts in the mofassil, of the rule of Hindu law that more interest than the principal could not be recovered. We are referred to a decision of the Bombay High Court in *Khushalchand Lalchand v. Ibrahim Fakir*,* but the decision of the Bombay Court appears to have been based upon a legislative enactment in force in Bombay, to the effect that the Courts in that Presidency were, in the absence of any specific Act of Parliament or legislation, to apply the usage of the country, and in the absence of such usage the law of the defendant. In the Presidency town here, no doubt, it has been held that the rule of Hindu law in question has not been abrogated by Act XXVIII. of 1855, and that the Supreme Court was, and the High Court is, bound in its original jurisdiction to administer the Hindu law in matters of such contract; but in the case before us the provisions of Act VI. of 1871, contained in s. 24, are applicable. According to that section, the rules of Mahomedan and Hindu law are to be administered to parties Mahomedans and Hindus respectively, only in matters of succession, inheritance, marriage, or caste, or any religious usage or institution. We think, therefore, that there was nothing to prevent the Court below from awarding the amount of interest which is in conformity with the contract between the parties, nor that there is anything to show that the defendant had not entered into this contract with his eyes open, or that there is any equitable ground on which this Court should interfere. The appeal is dismissed with costs.

* 3, Bom. H. C. Rep., A. C., 23.

HIGH COURT—N. W. P.

The 20th July, 1875.

PRESENT :

Mr. Justice Spankie and Mr. Justice Oldfield.

FATIMA BEGAM* (Plaintiff) *Appellant*,*versus*SAKINA BEGAM and another (Defendants) *Respondents*.*Dwelling-place—Act VIII. of 1859, s. 5—Act XXIII. of 1861, s. 4.—Jurisdiction.*

The fixed and permanent home of a man's wife and family, and to which he has always the intention of returning, will constitute his dwelling-place within the meaning of s. 5 of Act VIII. of 1859, and s. 4 of Act XXIII. of 1861.

The Court in delivering judgment said :—

The words dwelling or residence are synonymous with domicile or home, and mean that place where a person has his fixed permanent home, to which, whenever he is absent, he has the intention of returning. In *Lord v. Colvin*† it was held “that place is properly the domicile of the person in which he has voluntarily fixed the habitation of himself and family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home.” And in a case cited in Broughton's Civil Procedure Code, *R. v. Murray*,‡ it was held that a man may have two dwelling-places, living sometimes at one and sometimes at another, and during his temporary absence each house though empty, if there be an *animus revertendi*, will still be his dwelling-house.

In the present case, Azim Khan, being a sawar in the Scinde Horse, his duties no doubt oblige his presence with his regiment for the greater part of his service, but the quarters of a regiment, always liable to be changed, are the temporary and not the permanent residence of the soldier; Azim Khan's family residence, admittedly within the jurisdiction of the Court, and the fixed and permanent home of his wife and family, and to which he has always the intention of returning, will constitute his dwelling-place within the meaning of the law.

* *Vide* 1, Indian Law Reports, Allahabad Series, p. 51.

† 4, Drew, 366; 23, L. J., Chanc., 361.

‡ 2, East, P. C., 496.

PRIVY COUNCIL.

The 6th November, 1874.

PRESENT :

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier. Assessor : Sir Lawrence Peel.

*Appeal from the Calcutta High Court.*HURSUHAI SINGH* and others (Plaintiffs) *Appellants*,

vs.

SYUD LOOTF ALI KHAN (Defendant) *Respondent*.*Reformation of Submerged Land.*

Where land which has been submerged reforms and is identified as having formed part (even by accretion) of a particular estate, the owner of that estate is entitled to it.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH.—Their Lordships, considering the turn that the argument has taken, do not think it necessary to go at any length in this case. The suit was brought by the Appellants, the proprietors of mouzah *Muteor*, in *Tirhoot*, against the Respondents, the proprietors of mouzah *Ramnuggur*, to recover the possession of a large quantity of land which had been submerged by the River *Ganges*. It appears that the river flowed between the estates of the Plaintiffs and the Defendants, and in its course between the two estates there were from time to time various changes. There were two or three defined channels, which at times the river overflowed, and formed a pool or lake. The land which is the subject of the present suit was submerged, and when it first became free from water and re-appeared, it adhered to and adjoined the estate of *Ramnuggur*, and *prima facie* the accretion was to that estate; but upon an inquiry made by the Judge of *Patna*, who went to the spot, heard evidence, and took great pains to survey the district, he came to the conclusion that the submerged land, although it had reformed close to mouzah *Ramnuggur*, was, in point of fact, land which belonged to mouzah *Muteor*, and that there were means by which he could identify, and did identify, the land as having been, before its diluviation, part of that mouzah. He found those facts, and applying the law as he understood it to the facts, namely, that when submerged land can be identified upon its re-appearance as belonging to a particular estate, the proprietor of that estate is entitled to it because in truth he had never lost the land, the land was always his, and the difficulty of

* *Vide 2, Law Reports, Indian Appeals, p. 23.**

identification being removed by evidence—the land being in fact identified—there was no reason why the property should not be regained by him. He acted upon this principle of law, which had been at that time affirmed by the High Court of *Calcutta* in a case in which Sir *Barnes Peacock*, with two other Judges, had given the judgment. That, however, was the judgment of a Division Bench; and the High Court, upon appeal in the present suit, decided that they were bound by a subsequent decision of a full bench of the High Court, which had come to a contrary conclusion, and had held that land which re-appeared under circumstances like the present must be held to belong to the proprietor of the estate to which it had apparently accreted; and they remanded the cause to the Judge of *Patna*, who, without altering his finding on the facts, decided according to this view of the law, and his judgment was, as might be expected, upheld by the High Court, in the judgment now under appeal, on the case again coming before it upon the appeal of the present Appellants.

The question of law involved in these decisions, which is a very important one, was brought before this Committee, in a case of *Lopez v. Muddun Mohun Thacoor** in which the principles which should govern cases of this description were very fully discussed and elucidated, with the result that it was laid down by the authority of this Committee that where land which has been submerged reforms, and can be identified as having formed part of a particular estate, the owner of that estate is entitled to it. It is admitted by Mr. Leith, the Counsel for the Respondents that the authority of this case and others which have followed it before this Committee, cannot be disputed. Their Lordships think the principles laid down in those cases are perfectly correct, and are distinctly applicable to the present; and that if the facts are to be taken as they were found by Mr. Justice Ainslie, the judgment below must be reversed. Their Lordships, for the reasons they gave during the argument, think it is impossible those facts could be disputed with any effect at their bar, and therefore both law and fact are in favour of the Appellants.

Mr. Leith endeavoured to distinguish between the lands which were the permanently settled lands of *Muteor* and some lands which had been in themselves an accretion, and which were temporarily settled only with the Proprietors of *Muteor*. Their Lordships think,

* 13, Moore, Indian Appeal Ca., 467.

however, that this distinction cannot prevail. There is evidence from which it may be presumed that those lands accreted to the estate of *Muteor*, and it may be inferred from the mode of accretion that the Government settled with the proprietors upon the ground that they had so accreted, and therefore that he was entitled to the settlement.

On these grounds their Lordships think that the judgment of the High Court must be reversed, and they also think that the decree originally made by the Judge of *Patna* before the remand is the correct decree. They find there is no formal petition of appeal against the decree of the High Court which remanded the suit, but this judgment ought not to be allowed to stand in the way of the proper decree to be made in the cause, and will be nullified by the course their Lordships propose to take, viz., humbly to advise Her Majesty to reverse the judgment of the High Court now under appeal, and the second judgment of the Zillah Judge, and to direct a decree to be made in the suit to the effect of the original decree of the Zillah Judge. The Respondents must pay the costs of the litigation in *India*, and of this appeal.

Attorney for the Appellants: Mr. *T. L. Wilson*.

Attorneys for the Respondents: Messrs. *Henderson*.

BOMBAY HIGH COURT.

The 18th November, 1875.

PRESENT :

Mr. Justice West and Mr. Justice Nanabhai Haridas.

REG. v. LAKHYA GOVIND* and another.

Act X. of 1872, s. 67—Jurisdiction.

Dacoity having been committed in the territory of H. H. the Gayakwad and a part of the stolen property having been found concealed in the British territory, Held that a conviction of dacoity could not be sustained, that being a substantive offence completed as soon as perpetrated in the territory of H. H. the Gayakwad ; the conviction may be altered to one of retaining stolen property known to have been obtained by dacoity (Penal Code, s. 412), and the sentences upheld.

PER CURIAM.—We do not think the conviction of dacoity can be sustained. That was a substantive offence completed as soon as perpetrated at Velanpor, although, had Velanpor been in British territory, the subsequent acts in the process of taking away the property might, in the legal sense, as they would have the same legal character, have coalesced

with the first and principal one so as to give jurisdiction under Section 67 of the Code of Criminal Procedure. But we think the conviction may be altered to one of retaining stolen property known to have been obtained by dacoity (Indian Penal Code, Section 412), and the sentences upheld. The retaining is included in the more comprehensive charge viewed as an abstract accusation of an act attended with a certain intent or consciousness, and the conception of dacoity being independent of the place where it was committed suffices to cover what is embraced within it, though the latter was an act done in British territory. The retaining was in British territory; its legal character depended on circumstances the definition of which does not involve a territorial term, though on a question of the liability of any particular person under a combination of them the question of place would for jurisdictional purposes be an essential one.

We accordingly alter the conviction in the case of each prisoner to one under Section 412 of the Indian Penal Code without disturbing the sentences.

CALCUTTA HIGH COURT.

The 5th July, 1875.

PRESENT :

Mr Justice Glover and Mr. Justice Romesh Chunder Mitter.

GUNPUT NARAIN SINGH,* *Petitioner.*

Act VIII. of 1859, ss. 92 and 93—Interim Injunction—Suit for specific Performance of Contract to give in Marriage—Hindu Law—Ceremonies of betrothal.

Sections 92 and 93 of the Code of Civil Procedure do not apply to a suit for specific performance of a contract to give in marriage, and the Court will not grant an interim injunction to restrain the defendant from making another marriage with a third person.

Per GLOVER, J.—A suit for specific performance of a contract to give in marriage will not lie: the remedy is an action for damages for breach of the contract. The ceremony of betrothal does not by Hindu law amount to a binding irrevocable contract of which the Court would give specific performance.

In this case the petitioner instituted a suit for specific performance of a contract by defendant to give her daughter in marriage to petitioner's son and applied for an injunction under s. 93, Act VIII. of 1859, to restrain the defendant from celebrating the marriage of her daughter

* *vide* 1, Indian Law Reports, Calcutta Series, p. 74.

with any other person than the petitioner's son, until the said suit had been determined. The Judge having refused to grant the application, the petitioner applied to the High Court.

GLOVER, J. (In delivering judgment said):—As a general rule, a decree for specific performance of a contract is given only where an award of damages would be an incomplete relief, and the breach of promise to marry or to give in marriage is one to which a money penalty has in England at least* always been considered adequate. And if the matter is to be settled on the principles of equity and good conscience, it can hardly, I think, be said that the Courts in this country should interfere to enforce a marriage between parties one of whom is unwilling, whilst the other can obtain a money remedy for his disappointment. The authorities which have been quoted in support of the arguments that Hindu law demands the carrying out of a marriage when certain anterior ceremonies have been performed, do not, it seems to me, go farther than to declare it usually wrong to break such engagements.

I have not been able to discover any case like this decided on this side of India† but the question was very fully discussed in the Bombay High Court in the case of *Umed Kika v. Nagandas Narotamdas*‡ and it was there decided that the Court would not order specific performance (the girl not being a party to the suit), or compel the father to carry out a marriage with the person to whom the daughter had been betrothed.

The Court also held that a betrothal was not, according to Hindu law, an actual and complete marriage. It was shown in that case that there was no precedent for the contention that specific performance had ever been decreed in cases like the present. The authorities quoted (five cases in all), not going beyond this, that, in case the promise was not carried into effect within a certain limited period, the defendant should pay a certain sum by way of damages.

* In *Jogeswar Chakrabati v. Panch Kauri Chakrabati*, 5, B. L. R., 395, it was held that, on breach of a promise to give in marriage, a suit to recover a sum paid as consideration would lie in the Civil Courts; but see *per Markby, J*; in *Asgar Ali Chowdhry v. Mahabut Ali*, 13, B. L. R., App., 34, where the remedy for breach of a contract to give in marriage is discussed.

† See a reference to the point in *Nowbut Singh v. Mussamut Sad Koor*, 5, N. W. P. H. C. Rep., 102.

‡ 7, Bom. H. C. R., O. C., 122.

I quite agree with what the learned Judges of the Bombay High Court say on this point, and the absence of any authority in favor of the petitioner points strongly to the conclusion that such a case as this has never been considered one in which any thing more than a money award of damages should be decreed.

The case of *Aunjona Dasi v. Prahlād Chandra Ghose** does not seem to apply. In that suit it was held that a suit by a Hindu mother to declare the marriage of her daughter with the defendant was null and void would lie in the Civil Court. I was of a contrary opinion at the time; but granting that such a suit will lie, how does that affect the present case? It is not averred by the petitioner that his marriage was ever actually completed.

With regard to the effect of betrothal, the reference made to the Vyavastha Darpana applies to Bengal only; but even there, according to the authorities quoted in vyavastha 386 (p. 646), betrothment is not considered marriage irrevocable; for, as a matter of fact, a girl betrothed to a man, who dies before actual and complete marriage, can afterwards be married to another man, and this seems a complete answer to the allegation.

The judgment of the Bombay High Court refers to the Mitakshara, and that is the law which applies to the case before us. By that law, ch. ii., s. 11, v. 27, retraction of betrothal is punishable by a fine to the king, and may in some cases be made without any penalty, provided good cause be shown, and one, if not the only, good cause, is said to be the coming of a "preferable suitor."

It appears to me, therefore, that as the plaintiff would fail in a suit for specific performance of the marriage (I do not wish to prejudge matters, but that is my opinion), he ought not to obtain an injunction to prevent the girl's guardian making other matrimonial arrangements. I think that the Subordinate Judge was right, and that this application should be refused.

MITTER, J.—Without expressing any opinion upon the question, whether a suit of this nature will lie or not, I also think that this application ought to be refused. I reject it upon the grounds that the matter does not come within the purview of either s. 92 or s. 93 of Act VIII. of 1859; and, if it did, the petitioner should not be allowed to question the order of the lower Court in this form, when he has under the law the right to appeal in a regular way.

Appeal dismissed.

CALCUTTA HIGH COURT.

The 5th February, 1867.

PRESENT :

The Hon'ble Louis S. Jackson and F. A. Glover, *Judges.*SUDERUDDEE and ZUMEERUDDEE* (Defendants) *Appellants,**vs.*WOOMA CHURN CHATTERJEA. (Plaintiff) *Respondent.**Rejected Revenue Survey—Chittahs—Entries of facts—Admissibility in evidence.*

The Revenue Survey having been rejected by the Board of Revenue on grounds connected with the scientific accuracy and usefulness of the survey, the entry of facts in the chittahs of that survey was not made at all less valid.

MR. JUSTICE JACKSON.—The special appeal in this case fails.

The Principal Sudder Ameen has found upon the evidence recorded both in the Courts and before the Ameen who made a local enquiry that the tank was the *Bromotur* tank of the plaintiff and a circumstance strongly corroborative of that evidence is that, in the Revenue Survey made more than 20 years ago, the tank is entered as a *Bromotur* tank in the Government chittahs.

It has been alleged by special appellant that the Revenue Survey has been set aside by the Board of Revenue as incorrect and consequently that the chittahs of that survey are not receivable in evidence. But the rejection of the Revenue Survey as alleged was not on grounds which made the entry of facts, like that now in issue, at all less valid. The Survey was rejected on grounds altogether of a different nature connected entirely with the scientific accuracy and usefulness of the Survey.

The decision of the Lower Appellate Court is affirmed with costs.

Mr. Justice Glover concurred.

HINTS FOR POLICE IN CASES OF VIOLENT DEATH.

In cases of hanging or strangulation.

1. Note, if possible, before cutting down the body, or removing the strangulating medium, any lividity of face, especially of lips and eyelids; any projection of the eyes; the state of the tongue, whether enlarged and protruded, or compressed within the lips; the escape of any fluid from mouth and nostrils, and direction of its flow.

* Case No. 2709 of 1866 (never before reported.)

2. On cutting down the body, or removing the strangulating medium, note particularly the state of the neck, whether bruised along the line of strangulation.

3. Note the direction of the mark, whether circular or oblique.

4. Note the state of the thumbs, whether crossed over the palm.

5. If possible, bring away the materials by which the hanging or strangulation has been effected.

On finding a body in a tank or well.

1. Note any marks of blood about the mouth, or on the sides of the well or tank.

2. On removing the body, carefully examine for, and note any external marks of injury, especially about head and neck.

3. Note state of skin, whether smooth or rough.

4. Examine the hands, and carefully remove anything they may hold.

In the case of a body found murdered in an open field.

1. Note the number, character, and appearance of any injuries.

2. Should a weapon be found, cover with paper, and seal any marks of blood, and especially note and preserve any adherent hairs.

3. In the case of an exposed infant, note the state of the cord, especially if tied, and any marks of violence.

In a case of presumed murder and burial of the remains.

1. Examine for, and note any marks of violence, about the skull especially.

2. Note carefully any indications of sex ; especially bring away a jaw and the bones of the pelvis.

3. If any suspicions of poisoning, bring away (sealed) the earth where the stomach would have been.

4. If the body, presumed to have been murdered, has been burned, collect and bring in any fragments of bones which may be found among the ashes.

Questions to be put in cases of poisoning.

1. What interval was there between the last time of eating or drinking and the first appearance of the symptoms of poisoning ?

2. What interval was there between the last time of eating or drinking and the death of the person (if this occurred) ?

3. Did the person move from the place where the first symptoms were noticed ? If so, how far did he go ?

4. What were the first symptoms ?
5. Did vomiting or purging occur ?
6. Did the person become drowsy or fall asleep ?
7. Were there any cramps or twitching of the limbs observed, or tingling in the skin or throat complained of ?
8. Mention any other symptoms noticed.

SHORT NOTES.

CALCUTTA HIGH COURT.

Purchaser at Sale by Sheriff under Writ of fieri facias—Sale subsequently declared invalid—Suit to recover Purchase-Money—Liability of Execution-Creditor—Jurisdiction—Act VIII. of 1859, ss. 207, 242.

The plaint in a suit by A against B stated that, in a suit in which B had recovered judgment against C, a writ of fi. fa. was, on 18th June 1866, issued on the application of B, directing the Sheriff of Calcutta to levy the judgment-debt by seizure, and, if necessary, by sale, of the property of C in Bengal, Behar, and Orissa, or in any other districts which were then annexed or made subject to the Presidency of Fort William in Bengal; that the writ did not authorize the execution thereof against immoveable property in Oudh; that under the writ the Sheriff, acting under instructions from B, seized and put up for sale the right, title, and interest of C in a talook in Oudh, which was purchased by D, to whom the Sheriff executed a bill of sale, and on receipt of the purchase-money paid a portion thereof to B and the balance to C, and put D into possession of the property, and he remained for some time in possession and in receipt of the rents and profits; that, eventually, in proceedings in Oudh, instituted by D for partition of the property purchased by him, the sale was pronounced to be null and void, and was set aside, and D was removed from possession,* and that the plaintiff sued as the executor of D to recover the whole of the purchase-money from B. *Held*, on appeal, affirming the decision of Phear, J., that the plaint disclosed no cause of action: 1st, because a purchaser who, after the execution of the conveyance, is evicted by a title to which the covenants in the conveyance do not extend cannot recover the purchase-money from his vendors; 2nd, because the Sheriff was not the agent of B for the sale of the property, and therefore no privity of

* It did not clearly appear from the plaint in what way or by whom the purchaser was evicted.

contract existed between B and D; 3rd, because D having been for some time in possession of the property and in receipt of the profits thereof, there had not been a total failure of consideration, and the plaintiff accordingly could not maintain the action in its present shape, viz., for money had and received.

The judgment of the High Court in *Biseswar Lall Sahoo v. Ramtukul Singh*,* explained by Phear, J., and ss. 201 and 242 of Act VIII. of 1859 observed upon.

Vide 1, Indian Law Reports, Calcutta Series, p. 55, (Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Markby)—The 4th, 5th and 23rd August 1875.—Dorab Ally Khan vs. Khajah Moheesooddeen.

Small Cause Court, Calcutta, Constitution of—Act IX. of 1850 and Act XXVI. of 1864—Writ of Habeas Corpus, Return to—Privilege from Arrest—Witness—Undertaking by Prisoner not to sue.

The Small Cause Court in the Presidency town is not a Court of co-ordinate jurisdiction with the High Court, but a Court of inferior jurisdiction and subject to the order and control of the High Court. Therefore, where on a prisoner being brought up to the High Court on a writ of habeas corpus ad subjiciendum, the return of the jailor stated that the prisoner was detained under a warrant of arrest issued in execution of a decree of the Small Cause Court, *Held*, that the return was not conclusive, but the prisoner was entitled to show by affidavit that he was privileged from arrest at the time he was taken into custody.

Held, also, that on the facts shown in the affidavit the prisoner was privileged at the time of his arrest.

The prisoner was required before his discharge to give an undertaking that he would bring no action for damages for illegal arrest or false imprisonment against the Judges of the Small Cause Court, the bailiff, the jailor, or the judgment-creditor.

Vide 1, Indian Law Reports, Calcutta Series, p. 78. (Mr. Justice Phear). The 9th September 1875—Omritolall Dey.

Jurisdiction—Suit for Land—Letters Patent, 1865, cl. 12.—Injunction.

In a suit brought against the owners of a mine adjacent to a mine belonging to the plaintiffs, the plaint alleged that a certain boundary line existed between the two mines, and prayed for a declaration that the boundary line was as alleged, and that the defendants might be res-

trained by injunction from working their mine within a certain distance from such boundary line. The defendants in their written statement disputed the plaintiff's allegation as to the course of the boundary line. The mines were situated out of the jurisdiction of the High Court, but both the plaintiffs and defendants were personally subject to the jurisdiction. *Held*, that the suit was a suit for land within cl. 12 of the Letters Patent, and therefore one which, the land being in the mofussil, the Court had no jurisdiction to try.

On the facts stated in the plaint and before the filing of the defendants' written statement, the Court granted an *interim* injunction, and refused an application to take the plaint off the file.

Vide 1, Indian Law Reports, Calcutta Series, p. 95. (Phear, J.)—The 20th, 24th and 28th September 1875.—The East Indian Railway Company *vs.* The Bengal Coal Company.

HIGH COURT—N. W. P.

Hindu Law—Inheritance—Act I. of 1872, s. 108—Act XVIII. of 1872, s. 9—Missing Person—Presumption of Death—Burden of Proof—Act VI. of 1871, s. 24.

The reversioners next after J. to the estate of S. deceased sued to avoid an alienation of S.'s estate affecting their reversionary right made by his widow. J. had not been heard of for eight or nine years, and there was no proof of his being alive. *Held* that his death might be presumed under the provisions of s. 108, Act I. of 1872, for the purposes of the suit, although, in a suit for the purpose of administering the estate, the Court might have to apply the Hindu law of succession prescribed when a person is missing and not dead. *—*

Vide 1, Indian Law Reports, Allahabad Series, p. 53. (Full Bench, Turner, Offg. C. J., and Pearson, J., Spankie, J., and Oldfield, J.) The 22nd August 1875. Parmeshar Rai.

Mahomedan Law—Inheritance—Minor.

Two of the widows of a deceased Muhammadan sold a portion of his real estate to satisfy decrees obtained by creditors of the deceased against them as his representatives. The sale-deed was executed by them on behalf of the plaintiff, a daughter of the deceased, she being a minor, in the assumed character of her guardians.

Held, if the plaintiff was in possession, and was not a party to, or properly represented in, the suits in which the creditors obtained decrees, she could not be bound by the decrees nor by the sale subsequently effected, and she was entitled to recover her share, but subject to the

payment by her of her share of the debts for the satisfaction of which the sale was effected.

Vide 1, Indian Law Reports, Allahabad Series, p. 57. (Full Bench, Turner, Offg C. J., and Pearson J., Spankie J., and Oldfield, J.)—The 27th August 1875.—Hamir Singh.

BOMBAY HIGH COURT.

Bond—Error in Account—Waiver—Estoppel—Indorsement—Receipt—Evidence of payment.

Where the defendant executed to the plaintiff a bond for the payment of the balance found to be due from the defendant to the plaintiff upon an adjustment of the account of their mutual dealings, which bond contained the following stipulation; "I shall pay the money after causing the payment to be entered on the back of this bond or after taking a receipt for the same. I shall not lay any claim to any payment made except in this way."

Held that, though the defendant at the time of the adjustment disputed the correctness of the account, yet that by having executed the bond and made payments under it, he must be held to have waived his objection, and in a suit on the bond could not be permitted to re-open the question of the correctness of the balance, though he might possibly have been allowed to do so had he alleged that he had discovered errors in the account after the execution of the bond, and had he specified some of the alleged errors.

Held also that the stipulation in the bond could not be permitted to control Courts of justice as to the evidence which, keeping within the rules of the general law of evidence in this country, they may admit of payments; and the Anglo-Indian law of evidence not excluding oral evidence of payments, it would be against good conscience and the policy of the law to reject it, though the absence of indorsements is a circumstance of some importance, which ought not to be overlooked, but is 'y no means conclusive.

Bekana Tatiak v. Vasuntum Chinna (Mad. S. D. A. Rep. for 1855, pp. 49 and 50) impeached; *Sashachellum Chetty v. Govindappa* (5, Mad. II. C. Rep., 451), *Kashinath Balal Oka v. Nurria Jan* (Bom. Sp. Ap. 438 of 1872), and *Nugur Mull v. Azeemoolah* (1, N. W. P. H. C. Rep. 146,) approved.

Vide 1, Indian Law Reports, Bombay Series, p. 45. (Westropp, C. J., and Kemball, J.) The 14th October 1875. *Narayan Undir Patil v. Motilal Ramdas.*

*Act XVIII. of 1854, Section 17—Act XXV. of 1871, Section 2—
Railway-Company—Ticket—Trespass.*

The plaintiff entered a carriage on the defendants' railway at Surat with the purpose of proceeding to Bombay. By an oversight, and without any fraudulent intent, he omitted to procure a ticket at Surat. On arriving at Nowsari, he applied to the station master for a ticket to Bombay, but was refused; he was however allowed by the defendants' servants to proceed in the same train to Balsar, where he again applied for a ticket and was again refused, but was directed by the defendants' servants to get into the train and not leave it again. At Dhandu he again got out and applied for a ticket to the station master. During a discussion between the plaintiff's master and the station master, the plaintiff, at the direction of his master, re-entered the train. Ultimately the station master refused to give the plaintiff a ticket, and ordered him to get out of the train; and on his not complying with his order, sent a sepoy, who forcibly removed the plaintiff from the carriage. In an action by the plaintiff to recover damages for the forcible and illegal removal of the plaintiff from the carriage, and for the illegal detention of the plaintiff at the station at Dhandu, and for illegal refusal of the defendants to allow the plaintiff to proceed in the train to Bombay.

Held, 1st, that the latter portion of Section 2 of Act XXV. of 1871, amending Section 1 of Act XVIII. of 1854, which provides for payments to be made by persons failing to produce their tickets when demanded by the servants of the Company, applies only to the case of a person who has received a ticket, and will not or can not produce it, and not to a person travelling without having obtained a ticket with no intention to defraud;

2nd.—That the absence of a fraudulent intention did not make the entry into the carriage less unlawful, and consequently that the plaintiff started from Surat as a trespasser;

3rd.—That the conduct of the railway officials at the stations intermediate between Surat and Dhandu, if it amounted at all to leave and license to the plaintiff to proceed without a ticket, could only operate as such until the train stopped at the next station;

4th.—That there was no legal obligation on the station master to issue a ticket to the plaintiff to enable him to proceed from Dhandu.

Vide 1, Indian Law Reports, Bombay Series, p. 52. (Westropp, C. J., and Sargent, J.) The 27th November 1875—Pratab Daji.

EARLY STRUGGLES OF EMINENT LAWYERS.*

"Parts and Poverty," said Lord Chancellor Talbot, "are the only things needed by the law student." "Pray, my lord," asked a fashionable lady, of Lord Kenyon, "what do you think my son had better do, in order to succeed in the law."—"Let him spend all his money, marry a rich wife, spend all hers, and when he has not got a shilling in the world, let him attack the law." Such was the advice of the old chief justice.

Such sentiments as these it has been the fashion to laud. In themselves they are true, but they are only half-truths—or, perhaps, we should rather say, they are the precise converse of great errors. A wealthy man is less likely to make a good lawyer, than a man who is not rich, just as we are told he is less likely to inherit eternal life. An individual who "has every thing handsome about him," on whom fortune has abundantly showered her gifts, and to whom pleasure offers her thousand inducements, is assuredly not the most likely, nay, is just the least likely person, with Sir William Blackstone, to

"— welcome business, welcome strife,
Welcome the cares, the thorns of life;
The visage wan, the pur-blind sight,
The toil by day, the lamp by night."

So he is the more likely to tread "the primrose path of dalliance," than "the steep and thorny way to heaven."

It may be questioned whether poverty, and the difficulties which so often beset men in their passage through life, have all the beneficial influence which is ascribed to them. The school of adversity as often indurates as softens the affections of mankind. In many minds, instead of producing humility and industry, it produces only disgust and indifference. Again, looking particularly to our profession, it may be doubted whether poverty has not, in many cases, the effect of distracting the attention from professional subjects. When the unfortunate Donald, the author of "Vimonda," was asked how he was getting on with his tragedy, he replied, in a tone of indescribable sorrow, "Talk not to me of my tragedy—I have more tragedy than I can bear at home." With a family reduced almost to starvation, we could hardly expect his mind to have been devoted to his noble subject.

Lord Erskine said that the first time he addressed the court, he was so overcome with confusion, that he was about to sit down. "At

* 1, Law and Lawyers, p. 48.

that time," he added, "I fancied I could feel my little children tugging at my gown, so I made an effort—went on, and—succeeded." With a man of less sanguine temperament, the same feeling would have only added to his confusion—the conviction that, upon his success at that time, depended the future welfare of those he loved, would only have aggravated the embarrassment of his novel situation.

About thirty years ago, a young man, a scion of a respectable family, came up to London to prepare himself for the bar. His means were small, but his wants were limited, and well aware that if fortune does not always favor the deserving, she has, for the ignorant and dissolute, no honors or rewards, he applied himself with zeal and industry to the study of his profession. Nature had blessed him with an acute mind—his perseverance was untiring, and he could boast that pleasure never allured him from the paths of duty. He was, in due time, admitted to the honors of the wig and gown, and took his seat on the back benches in the Court of King's Bench. His prospects were, at first, promising—his family connections—the reputation he had acquired, during his pupilage, for attention and industry, obtained for him, earlier than usual, a small practice, and what leads to its increase, a good name. Elated by the prospects which appeared opening before him, he married—and he was yet in the prime of life when he was the father of a large family. Unhappily, his business did not increase in the same ratio with his necessities, and he soon began to feel all the difficulties which attend on small supplies and large demands. His physical strength began to fail him, and all the more, when he saw his admirable wife, whom he loved with all the ardor of a first affection, devoting herself to the most menial tasks—discharging the humblest offices for him and their children. On her fragile frame, care and sorrow made rapid inroads. A casual attack of illness, aggravated by pecuniary distress, threatened her life, and, ultimately, she died—falling a victim to her anxieties for her husband and family. Heart-broken, the young lawyer still struggled on for the sake of his children. A few months after the partner of his cares was consigned to the grave, he succeeded in some important cause accidentally intrusted to him : business poured in on him ; and, in a very short time, he found himself one of the leaders of the bar. When a friend congratulated him on his sudden promotion, he exclaimed—"Had it but come a few months sooner!"

Reader! this is a true story, as many can vouch : the subject of it now occupies a high place amongst our legal functionaries.

Fletcher Norton* toiled through the routine of circuits and Westminster Hall for many years, without a brief. Mr. Bearcroft, one of the most eminent barristers of the last century, and who died Chief Justice of Chester, underwent the severest difficulties in his passage to wealth and fame. His industry and perseverance were indomitable. For many years his practice was so limited as hardly to suffer him to subsist with the strictest economy. He sometimes, however, thought of relinquishing the law as a profession, but a just estimation of his own acquirements induced him to continue, and he at last made himself known, and obtained an immense practice and a high reputation. It was a long time before the eminent merits of Mr. Holroyd, afterwards a puisne judge in the King's Bench became recognised. Lord Kenyon spoke of him when in his forty-seventh year, as "a rising young man." Sir William Grant travelled many a circuit before he obtained a single brief, and at last owed to the friendship of a minister, what he was entitled to expect from his own merits.

The rise of SIR EDMUND SAUNDERS, one of our soundest lawyers, from the very depths of poverty to the chief justiceship of Common Pleas, is one of the most remarkable circumstances in our legal annals. Saunders was originally, if not a parish foundling, at least, a poor beggar boy; and by constant attendance in Clements Inn, obtained the notice of the attorneys' clerks. Finding he was anxious to learn to write, some benevolent attorney had a sort of mock desk constructed for him at a window on the top of a staircase, where he sat and wrote after copies of court and other hands lent him by the clerks. In this he soon became so expert, that he used to obtain employment as a copier, and made some little money in this way. Some books of forms having been lent him, he became "an exquisite entering clerk," and then acquired a knowledge of special pleading. He at last obtained some assistance, which enabled him to be called to the bar, and he acquired a practice in the King's Bench equal to any other lawyer of his day. We are sorry

* With Sir Fletcher Norton, as with many others, "Early Struggles" appeared to have, in some measure, operated injuriously. To them might be ascribed the parsimony and avarice for which he was distinguished in after years, and which obtained for him the elegant appellation of Sir Bullface Doublefee. Lord Orford mentions an instance of his *amor pecunie*, which deserves to be extracted. "His mother lived at a mighty shabby house at Preston, which Sir Fletcher began to think not quite suitable to the dignity of one who had the honor of being his parent; he cheapened a better, in which were two pictures, valued at £60. The attorney insisted on having them as fixtures for nothing: the landlord refused—the bargain was broken off—and the dowager madam remains in her original hut."

to be compelled to add, he was in his habits grossly intemperate—"for, to say nothing of brandy, he was seldom without a pot of ale at his nose or near him. By this means he became corpulent and gross in his habit of body, so much so as to be offensive to the Bench, and every one near him. Sir Matthew Hale appears to have disliked him on account of his ill-life, and also on account of his habit of attempting to deceive the court by tricks and subterfuges. To this latter practice he was much addicted, and he appeared to think his zeal for his client justified him in pursuing it. He was witty and good tempered, and was often seen in court before the judge had arrived, surrounded with students, putting cases to them and debating law points with a familiarity that bespoke native goodness of heart. When at the bar, although in enormous practice, he lodged with a tailor, in Butcher's Row, an abode in which he continued after he was raised to the Bench. This elevation he owed to the ability he had manifested when counsel for the crown on several occasions; but it was the cause of his death, from its imposing upon him very severe labors, and the necessity of changing his diet and habits.

PRIVY COUNCIL.

The 22nd and 23rd April; and 16th May, 1874.

PRESENT:

Sir James W. Colville, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and Sir James Hannon.

On appeal from the Appellate Court of Malta.

COUNT G. F. SANT,* BARON OF CASSIA (Appellant)

versus

THE COUNTESS GENEROSA, the WIFE OF COUNT SANT (Respondent.)

Judicial Separation—Ill-Treatment of Child equivalent to Ill-Treatment of Parent—Affirmative and Negative Evidence.

Under the words "*ingiurie gravi*" in the 46th Article of the Maltese law relating to the separation of married persons, it was intended to leave a large discretion to the tribunal having to judge of the facts. Not only acts but words designed to wound the feelings of the wife may amount to "*ingiurie gravi*", and in considering whether they do so, the position of the parties and the habits and usages of the society in which they live must be regarded. Insults offered to the wife which manifest contempt of her in that character are of special gravity, especially if offered in the presence of others; and wrongs of this description are not to be estimated separately, but in combination one with another.

* *Vide* Law Reports, Privy Council Appeals, Vol. V., p. 542.

Where a husband habitually treated his wife with harshness and insult, and thereby kept her in a constant state of excitement and fear, and also, upon a trifling pretext, used personal violence to their adult daughter, by which her health was affected during several months :—

Held, that the violence offered to the daughter must be taken in conjunction with the previous treatment of the mother, and that together they constituted "*ingiurie gravi*" within the meaning of the 46th Article.

Where a father ill-treated his daughter in such a manner as to afford to his wife a ground, under the Maltese law, for demanding separation from him, but the wife remained in his house for several months, during which the daughter continued to suffer from the consequences of the ill-treatment, and required the attention of her mother ; and the wife quitted her husband's house on the first occasion of his leaving home :—

Held, that the matrimonial offences of the husband had not been condoned.

The testimony of witnesses deposing to what they saw and heard is of more value than that of persons who, from the necessity of the case, are only able to state that they did not see or hear similar conduct and words.

SIR JAMES HANNEN (In delivering judgment said) :—Their Lordships consider that, under the words "*ingiurie gravi*," it was intended to leave a large discretion to the tribunal having to judge of the facts ; that not only acts but words designed to wound the feelings of the wife—whereas in this case, she is the complaining party—may amount to "*ingiurie gravi*"; that, in considering this question, the position of the parties, the habits and usages of the society in which they live, must be regarded ; that insults offered to the wife, which manifest contempt of her in that character, are of special gravity, and that that gravity is increased if the insults be offered in the presence of others ; that wrongs of this description are not to be estimated separately, but in combination one with another.

Having considered the principles applicable to the case, the facts may be briefly stated as follows :—

The parties were married on the 31st of August, 1830, and have had five children. They were both of high rank, the Appellant being noble, and the lady of equal birth. They appear to have been in somewhat straitened circumstances for their position in society.

There is nothing in the evidence to shew that their early married life was not happy ; and all the witnesses who were called to establish the charge of cruelty against the Count speak chiefly as to events of the four or five years preceding the separation.

One witness (*Nicola Ferrugia*) called by the Count gave evidence from which it would appear that, as long ago as 1849, the Appellant used threatening and insulting language towards his wife : " One day the Count, taking a plate in his hand, said to the Countess, threatening

her, 'If you speak, I will break your head with this plate. Your income is not enough for your slippers.'" But, whether this be regarded as an isolated outburst of temper or as indicative of his habitual behaviour, it appears from the general tenor of the evidence of the witnesses called on behalf of the Countess, that the conduct of her husband towards her, and one at least of her children, had assumed a more serious character about the year 1866: "Once, four or five years ago," says the witness *Flena Bonatto*, in her examination taken in May, 1870, "I approached Miss *Angelica*, and, finding her crying, she told me that she had got a slap in the face."

Lorenzo Vella, coachman to the Count's father, speaking of the general behaviour of the Count when he came with his family to visit his father during the nine years which preceded 1864, says, "When the Count came, he got angry with everyone, also with his father. The Count Francesco used to threaten every one. There was no reason for it. He used to call the wife and children 'carrion', but not his father. He spoke so whilst irritated, because everything irritated him."

Maria Bonello, also in the service of the Count's father, says, "When he came he scolded the lady. Once, five years ago, the Count came about 10 p. m. I heard him cry out. I heard from his lady, who was crying, that he was scolding her because she had gone out to church. He continued scolding till about midnight, and returned to town at night-time."

The principal evidence offered on behalf of the Countess is that of servants living in the house.

Lorenzo Camilleri, who lived eleven years in the family, says, "The lady was treated badly; he swore at the lady, and at the children also, in a passion. There was no cause for the anger. I sought to get away, not to hear the bad words. The last quarrel took place about two years or twenty months ago (*i. e.*, in 1868). The Count said, 'It will end badly, we shall finish badly;' and sometimes he said, 'On account of yourselves I shall go to the gallows.'"

He also states that the Count, in the presence of his family, used profane language in depreciation of matrimony, and continued, "Some months before I left the Count's house I heard him say, 'I raised you from the mud, your income does not serve me for tooth-picks.' Oftentimes I have seen the wife in tears, also the children. When the Count knocked at the door the family got timid. The Count at times used the word 'carrion' (*carogna*) to his wife."

He also states that the Count used to apply a grossly obscene term of abuse to his wife.

Elena Bonatto, more than nine years a servant of the parties, states that the Count used towards the lady the expression "carrion," that he threatened in gross terms to kick her, that he threatened to turn her out of the house, that sometimes the reason was some mistake of the witness herself in serving the dinner, that the Countess was often weeping, that the Count cursed and swore and used improper words before the children, as well as before their mother, and particularly that he used with reference to his wife, and in her presence, language of the most disgusting indecency, too gross to be here repeated.

Margarita Ferrugia, a servant in the house for two years and a half before the Countess left, deposed that the Count threatened to kick his wife, and to throw her out of the window; and on one occasion, when the lady was in bed, he threatened to throw her out with her chemise on, and to kill her; that after this, from 3 o'clock in the morning till 6, he took to walking about, swearing, cursing, and grumbling, from the lady's room to his own. "At last he remained in his room." "During my stay," the witness continues, "their house was a hell. He used to say to the lady she was good for nothing; that he had raised her from the dirt. He swore by the Virgin Mary. A day did not pass without some quarrel. He used to say that he would be sent to the gallows on her account."

This witness also corroborated the last as to the use by the Count of the obscene and insulting language to the Countess already referred to. "He did not call her by name, but would say, 'I say, come here,' and call her a sow and brood-hen. These words he used openly at dinner before the children and servants."

No suggestion of a reason was offered why these witnesses should not be believed, except the antecedent improbability that a gentleman should be guilty of such conduct to his wife; but the length of time they were in the service of the Count is a testimony to the general goodness of their character, and no questions were put to them in cross-examination with a view of shaking their credibility.

On the other hand, their statements were corroborated in some important particulars by the evidence of *Dr. Mifsud*, the medical attendant of the family. He says, "I observed that he, the Count, is of a hard disposition. The father is of an irascible character, in consequence whereof, when he is under some impulse, he does not pay any respect

to the state of illness of the wife and of the family. If at any time some family dispute arises with the servants, or something similar, he gets into a passion and utters some injurious word even in the sick room; words addressed to the servants and sometimes to the wife, momentarily aggravating the state of the sick person. For example, the words used were that the position of the wife depended on her title as Countess, and speaking with contempt of her family. I also heard him swearing as if using familiar expressions. The words were uttered in a loud voice audible to the family. I also attended the Count sometimes, but his irascibility surmounted his indisposition," probably meaning that his illness did not prevent his outbursts of temper. "I do not remember injurious words in presence of the lady, but there were such words said to me in regard to her. I always observed the exasperated state of the Count. I told the Count to repress his irritation; he used to say, 'I cannot.'"

Their Lordships are of opinion that the evidence of these witnesses outweighs the testimony of those persons who were called on behalf of the Count.

Some of these, indeed, gave evidence rather tending to support the charges made against the Count. The evidence of *Nicola Ferrugia* has already been referred to. Another, *Camilleri*, had only been in the Count's service a month when the Countess left; but he, while stating that he saw no blows and heard no bad language, says that when the lady and family used to retire, the Count remained to grumble, and swore against those who had caused him to marry.

The other witnesses called by the Count were either men servants (such as the game-keeper and coachman), not having the same opportunities of observing his behaviour as those called by the Countess, or acquaintances, before whom, on the rare occasions on which they saw him, it may well be that he restrained his passion, while in the privacy of his home he may have permitted it to carry him to the excesses deposed to by the domestic servants and *Dr. Mifsud*. Even if the weight of evidence on the one side and the other were more equally balanced than it is, their Lordships would not lightly set aside, on a question of fact, the finding of the tribunal which had an opportunity of hearing the witnesses and observing their demeanour; but without these advantages their Lordships think that the testimony of the witnesses deposing to what they saw and heard is of more value than that of persons who, from the

necessity of the case, are only able to state that they did not see or hear similar conduct and words.

The result is, that their Lordships come to the conclusion that the Count, for some years before his wife left her home, had been accustomed to treat her with harshness and unkindness, and that he frequently insulted her in the grossest manner before her servants and children, and intentionally wounded her feelings as a mother and a woman by applying to her terms of the foulest vituperation, and that he thereby kept her in a constant state of excitement and fear, which could not but be prejudicial to her health.

This being the general condition of the household, it was proved, and not denied, that in November, 1868, the Count gave his daughter *Angelica*, a woman of thirty, some slaps in the face, he alleging that the only provocation she had given was that she contradicted him.

It was also proved by *Dr. Mifsud* that the effect of these blows, acting on the already delicate health of the daughter, was to throw her into convulsions, which continued to return during several months, and that the lady and all the family from the time of this occurrence were in fear of the Count.

Their Lordships are of opinion that this violence offered to the daughter must be taken in conjunction with the previous treatment of the mother, and that together they constitute "*ingiurie gravi*" within the meaning of the 46th Article.

It was, however, argued that the Countess, by not leaving her husband before February, 1869, condoned his matrimonial offences. Their Lordships are of opinion, however, that this defence is not established. It appears that *Angelica* remained ill from the consequences of her father's violence for several months, during which she required the attention of her mother, and it further appears that on the first occasion of the Count leaving home the lady took advantage of the opportunity to escape from the house.

Their Lordships will, therefore, humbly recommend to Her Majesty that the judgment of the Court of Appeal of *Mulla* of the 22nd of April, 1872, be affirmed, and that this appeal be dismissed with costs.

PRINCIPLES OF CIVIL LAW.

Of all the objects of study, civil law is that which has the least attraction for those who do not study jurisprudence as a profession. But this is not saying enough. In fact, it inspires a kind of terror. But a slight reflection might convince them that this subject is of vast importance to them, as it treats of every thing that is most interesting to them, of their security, of their property, of their mutual and daily transactions, of their domestic condition, in the relations of father, of children, of husband, and of wife. Here it is that *rights* and *obligations* spring up; for all the objects of law may be reduced, without mystery, to these two terms.

The civil law is, in fact, only another aspect of the penal law; one cannot be understood without the other. To establish *rights*, is to grant permissions; it is to make prohibitions; it is, in one word, to create offences. To commit a private offence is to violate an obligation which we owe to an individual,—a right which he has in regard to us. To commit a public offence is to violate an obligation which we owe to the public—a right which the public has in regard to us. Civil law, then, is only penal law viewed under another aspect. If we consider a law at the moment when it confers a right, or imposes an obligation, this is the civil point of view. If we consider a law in its sanction, in its effects as regards the violation of that right, the breaking through that obligation, that is the penal point of view.

What is to be understood by *principles of civil law*? They are the *motives* of laws; the knowledge of the true *reasons* which ought to guide the legislator in the distribution of the rights which he confers, and the obligations which he imposes.

All the objects which the legislator is called upon to distribute among the members of the community may be reduced to two classes:—

1st. *Rights.*

2nd. *Obligations.*

Rights are in themselves advantages, benefits, for him who enjoys them. Obligations, on the contrary, are duties, charges, onerous to him who is to fulfil them.

Rights and obligations, though distinct and opposite in their nature, are simultaneous in their origin, and inseparable in their existence. In the nature of things, the law cannot grant a benefit to one without imposing, at the same time, some burden upon another; or, in other

words, it is not possible to create a right in favor of one, except by creating a corresponding obligation imposed upon another. How confer upon me the right of property in a piece of land? By imposing upon all others an obligation not to touch its produce. How confer upon me a right of command? By imposing upon a district, or a number of persons, the obligation to obey me.

The legislator ought to confer rights with pleasure since they are in themselves a good; he ought to impose obligations with reluctance, since they are in themselves an evil. According to the principle of utility, he ought never to impose a burden except for the purpose of conferring a benefit of a clearly greater value.

By creating obligations, the law to the same extent trenches upon liberty. It converts into offences acts which would otherwise be permitted and unpunishable. The law creates an offence either by a positive command or by a prohibition.

These retrenchments of liberty are inevitable. It is impossible to create rights, to impose obligations, to protect the person, life, reputation, property, subsistence, liberty itself, except at the expense of liberty.

But every restriction imposed upon liberty is subject to be followed by a natural sentiment of pain, greater or less; and that independently of an infinite variety of inconveniences and sufferings, which may result from the particular manner of this restriction. It follows, then, that no restriction ought to be imposed, no power conferred, no coercive law sanctioned, without a sufficient and specific reason. There is always a reason against every coercive law—a reason which, in default of any opposing reason, will always be sufficient in itself; and that reason is, that such a law is an attack upon liberty. He who proposes a coercive law ought to be ready to prove, not only that there is a specific reason in favor of it, but that this reason is of more weight than the general reason against every such law.

The proposition that every law is contrary to liberty, though as clear as evidence can make it, is not generally acknowledged. On the contrary, those among the friends of liberty who are more ardent than enlightened, make it a duty of conscience to combat this truth. And how? They pervert language; they refuse to employ the word *liberty* in its common acceptation; they speak a tongue peculiar to themselves. This is the definition they give of liberty: *Liberty consists in the right of doing everything which is not injurious to another.* But is this the

ordinary sense of the word? Is not the liberty to do evil liberty? If not, what is it? What word can we use in speaking of it? Do we not say that it is necessary to take away liberty from idiots and bad men, because they abuse it?

According to this definition, we can never know whether we have the liberty to do an action until we have examined all its consequences. If it seems to us injurious to a single individual, even though the law permit it, or perhaps command it, we should not be at liberty to do it. An officer of justice would not be at liberty to punish a robber, unless, indeed, he were sure that this punishment could not hurt the robber! Such are the absurdities which this definition implies.

What does simple reason tell us! Let us attempt to establish a series of true propositions on this subject.

The only object of government ought to be the greatest possible happiness of the community.

The happiness of an individual is increased in proportion as his sufferings are lighter and fewer, and his enjoyments greater and more numerous.

The care of his enjoyments ought to be left almost entirely to the individual. The principal function of government is to guard against pains.

It fulfils this object by creating rights, which it confers upon individuals: rights of personal security, rights of protection for honor, rights of property, rights of receiving aid in case of need. To these rights correspond offences of different kinds. The law cannot create rights except by creating corresponding obligations. It cannot create rights and obligations without creating offences. It cannot command nor forbid without restraining the liberty of individuals.

It appears, then, that the citizen cannot acquire rights except by sacrificing a part of his liberty. But even under a bad government there is no proportion between the acquisition and the sacrifice. Government approaches to perfection in proportion as the sacrifice is less and acquisition more.

CALCUTTA HIGH COURT.

The 15th June, 1875.

PRESENT :

Mr. Justice Markby and Mr. Justice Morris, *Judges.*MAHOMED ARSAD CHOWDRY* (*a Defendant.*)*vs.*YAKOOB ALLY, (*Plaintiff.*)*Limitation—Minor, Purchaser from—Representative—
Act IX. of 1871, s. 7—Act XIV. of 1859, s. 11.*

Whatever may have been the effect of s. 11 of Act XIV. of 1859, as to extending the privilege given to a minor to his representative, s. 7, the corresponding section of Act IX. of 1871, limits the privileges to the minor himself and his representative after his death ; and therefore a purchaser from a minor cannot claim the benefit of that section.

This was a suit for recovering possession of an elephant or its value and damages. The plaintiff made his claim on the allegation that the elephant at first belonged to Nowab Ali Chowdry, upon whose death in F. S. 1274 (1866-67), it devolved upon his wife (the third defendant), who was then a minor ; that in the same year, on the 2nd of Magh (22nd January 1867), the first defendant, Mahomed Arsad Chowdry, wrongfully took possession of the animal and that the third defendant, on attaining her majority in F. S. 1280 (1873), sold it to the plaintiff, who, on the 25th of June 1874, instituted the present suit for the recovery thereof.

MARKBY, J. (After stating the facts of the case said) :—The date when the elephant was taken out of the possession of the then owner, was the 2nd Magh 1274 (22nd January 1867). And whatever be the exact nature of the cause of action which is put forward in this suit on the part of the plaintiff, it is admitted that the suit would be barred by the law of limitation, unless the plaintiff can bring himself within the provisions of s. 7, Act IX. of 1871.

It is not contended that the plaintiff himself is a minor, but he seeks to take benefit of that section as purchaser from a person who was a minor when this cause of action accrued. He is in fact the purchaser of the minor's claim to the elephant, and of her claim to damages on account of the elephant having been taken out of her possession. Now by

* *Vide* 15; B. L. R., p 357.

s. 4 of the Limitation Act (Act IX. of 1871), every suit must be brought within the time specified in the schedule, unless there is something in the provisions in s. 5 to 26 of the Act itself, which absolves the plaintiff from that necessity.

It is not a question therefore, as is argued before us, whether by the words of s. 7 the purchaser from the minor is excluded, but whether he can bring himself within the provisions of that section. The general words of s. 4 are sufficient to exclude him unless he can do this. Now, the first part of the section says:—"If a person entitled to sue, be at the time the right to sue accrued, a minor, or insane, or an idiot, he may institute the suit within the same period after the disability has ceased, or (while he is at the time of the accrual affected by two disabilities) after both disabilities have ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed."

That is a right clearly personal and restricted to the minor himself. Then the third clause goes on to say:—"When his (the minor's) disability continues up to his death, his representative in interest may institute the suit within the same period after the death as would otherwise have been allowed from the time prescribed therefor in the third column of the same schedule."

The minor, therefore, or his representative in interest after his death, has a special period allotted to him for bringing the suit. There are no words whatsoever in s. 7, which would give to any other person, in whatever way he might happen to be connected with the minor, any other period for bringing the suit than that specified for ordinary persons. That this is the true construction of this section also appears to be clear, if we compare the words of s. 7 of the present Limitation Act with the words of s. 11 of Act XIV. of 1859. There the words are "If at the time when the right to bring an action first accrues, the person to whom the right accrues is under a legal disability, the action may be brought by such person or his representative within the same time, &c."

There is nothing there which in express terms limits the term "representative" to a representative at the death of the minor. Whether upon the true construction of s. 11 the word "representative" can be extended so as to include a purchaser from the minor suing in his life-time, is a matter which of course we are not at present concerned to consider. No case has been shown to us, in which that section has been so extended. But, however that may be, it seems clear that

the intention of the Legislature was to make the language of the new Act more strict than the language of the old Act, and to limit the advantage of that section to the minor himself and to his representative after his death.

Some argument was addressed to us as to the improbability of the Legislature debarring the purchaser from a minor from any advantage which the minor himself might have. That is not a matter which can in any way enter into consideration of the construction of a section, the language of which is not in any way ambiguous. But so far as this particular case is concerned, I think we may fairly say that we have no hesitation whatsoever in applying the law of limitation to the claim of the plaintiff. The claim is one which we should by no means encourage, even supposing we do not go so far as to hold that it is one which is contrary to the policy of the law, and therefore void. It is quite clear that it was a purchase of a very speculative kind, and it is by no means improbable that, what is really meant to be tried under the allegation of this purchase, is some ulterior claim to more substantial part of the property of the minor. Therefore upon this ground of limitation alone, and without entering into any other portion of the case, we hold that the claim of the plaintiff is barred. But as there is a possibility of further litigation, we think it right to add that we express no opinion whatsoever whether the facts have been rightly found by the Court below. On the contrary, we feel bound to say that the investigation of facts in this case has not been in our opinion by any means satisfactory.

The judgment of the lower Court is reversed, and the suit dismissed with costs in this Court and in the Court below.

AN INSTANCE OF CROSS EXAMINATION.—*Q.*—"How many knaves do you suppose live in this street besides yourself?" *A.*—"Besides myself! do you mean to insult me?" "*Well* then, how many do you reckon including yourself?"

AN ACCOUNT OF A CELEBRATED JUDGE.—A late celebrated judge, who stooped very much when walking had a stone thrown at him one day, which fortunately passed over him without hitting him. Turning to his friend, he remarked "Had I been an upright judge this might have caused my death."

PRIVY COUNCIL.

The 1st, 2nd and 22nd June, 1875.

PRESENT :

Sir J. W. Colville, Sir B. Peacock, Sir M. E. Smith, and Sir R. P. Collier.

*On appeal from the High Court of Judicature at Madras.*SADASIVA PILLAI* (*Plaintiff*)*vs.*RAMALINGA PILLAI, (*Defendant*.)*Act XXIII. of 1861, s. 11—Execution—Mesne Profits and Interest—Estoppel.*

In construing the provisions of s. 11, Act XXIII. of 1861, notwithstanding certain earlier decisions to a contrary effect, all the Indian High Courts have now recognized it to be settled law that, where the decree is silent touching interest, or mesne profits, subsequent to the institution of the suit, the Court executing the decree cannot, under the section in question, assess or give execution for such interest or mesne profits, but that the plaintiff is at liberty to assert his rights thereto by a separate suit.

The Judicial Committee of the Privy Council, although of opinion that, if the matter had been *res integra*, the provisions of the section might have admitted of a different interpretation, being unwilling to run counter to a long and concurrent course of decisions of the Indian Courts in what is really a mere matter of procedure, accepted this construction of the law as binding.

The plaintiff obtained a decree for the possession of certain lands, with mesne profits up to the date of suit. No claim was made in the plaint for mesne profits accruing due after the date of suit, and the decree was silent in respect thereof. An appeal against the decree having been brought by the defendant, execution was from time to time stayed by the Court on the defendant giving security, to abide the event of the appeal, for the execution of the decree, and for payment of the mesne profits accruing, while the plaintiff remained out of possession. The decree having been confirmed on appeal, the plaintiff applied for execution in respect of the interim mesne profits.

Held in the Court below that, as these were not provided for by the decree, they could not, under s. 11, Act XXIII. of 1861, be awarded in execution, but must be made the subject of a separate suit.

Held by the Judicial Committee that the proceedings whereby the defendant led the Court to stay execution and continue him in possession, laid him under an obligation to account in the suit for the mesne profits which he engaged to pay; and that this obligation was capable of being enforced by proceedings in execution, notwithstanding the construction given by the Court to section 11; since even if the defendant's liability to account were not to be considered "a question relating to the execution of the decree," within the meaning of the section, he was, in any case, precluded by the ordinary principles of estoppel from contending that the mesne profits in question were not payable under the decree.

Where a Court has a general jurisdiction over the subject-matter of a claim, parties may be held to an agreement that the questions between them should be heard and determined by proceedings contrary to the ordinary *cursus curiæ*.

SIR J. W. COLVILLE.—Shunmooga Pillai and Chiddunbrun Pillai were cousins, and the only members of a joint and undivided Hindu family. Shunmooga died first, and in 1858 the appellant, claiming to be his adopted son, brought a suit to enforce his rights against Chiddunbrun, who denied the validity of the alleged adoption. The suit was in its nature one to establish the plaintiff's title as the heir of his adoptive father, and to obtain a partition of the joint family estate. It specifically claimed the mesne profits of the landed property from the date of the alleged exclusion,—that is to say, from the Fusli year 1267, corresponding with 1857-58, but did not claim mesne profits for the subsequent years. On the 11th of June 1859, the Civil Judge of Cuddalore made a decree in the plaintiff's favor, which affirmed his title as adopted son of Shunmooga, awarded to him a moiety of the joint estate, including certain lands, and the sum of rupees 4,395-6-7½ as his share of the mesne profits of such lands for the Fusli year 1267, but was silent as to the mesne profits which had accrued since the institution of the suit. Both parties appealed against this decree to the Sudder Court of Madras, which, by its decree dated the 24th of September 1860, dismissed the defendant's appeal and modified the decree of the Civil Court by awarding to the plaintiff a further sum of Rs. 3,494-4-1 as the value of his share in certain jewels and other moveable property. It left the decree of the Civil Court untouched in respect of the mesne profits of the immoveable property. The defendant appealed against the decree of the Sudder Court to Her Majesty in Council. His appeal abated on his death in 1862, but was revived by his son, the present defendant, and was finally dismissed by an order in Council in February 1864. This antecedent litigation, therefore, has conclusively established the title of the plaintiff to whatever he can claim under the decree of the 11th of June 1859 as varied by that of the 24th September 1860.

In September 1864, the plaintiff commenced the proceedings, out of which this appeal has arisen, in order to obtain execution of the decree made in his favor. By his petition he prayed to be put into possession of his share of the lands; to have execution for the ascertained sums awarded to him by the decree, including the mesne profits for the Fusli year 1267, with the interest thereon; and also to have execution for the two further sums of Rs. 48,075-14-1, and Rs. 15,890-15-7, the first being the alleged amount of mesne profits for the six years from Fusli 1268 to Fusli 1273; and the latter the estimated amount of interest due on such mesne profits. He has been put into possession of

his share of the lands, and may be assumed, subject to what may be said hereafter touching his share of the outstanding debts due to the joint estate, to have obtained all to which he can be entitled under the decree except the two last mentioned items, or such other sums, if any, as may be due to him for the mesne profits for the years in question, and interest thereon. His claim to such subsequent profits and interest was litigated between him and the respondent in the proceedings which will be hereafter more particularly considered. The result of these was an order of the Civil Court, dated the 31st of January 1872, which awarded to the plaintiff the sum of Rs. 36,223-6-2 for mesne profits, but rejected his claim for interest thereon. Against that order both parties appealed, the plaintiff insisting that he was entitled to more than had been awarded to him for mesne profits, and also to interest on such profits; the respondent for the first time contending that inasmuch as the mesne profits in question were neither asked for in the plaint, nor awarded to the plaintiff in the decree, the Civil Judge had no jurisdiction to award them under s. 11 of Act XXIII. of 1861, the enactment under which he had proceeded, and taking other objections to the order.

On the 28th of June 1872, the High Court of Madras disposed of these appeals by reversing the order of the Civil Court on the ground that, under the decree in the original suit, mesne profits subsequent to 1858 were not recoverable. The present appeal is against the last-mentioned order.

The first question to be considered is the construction to be put upon the 11th section of Act XXIII. of 1861, of which the material portion is in the following words:—"All questions regarding the amount of any mesne profits which, by the terms of the decree, may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit, between the date of the suit and the execution of the decree,

. . . . and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit, and the order passed by the Court shall be open to appeal."

It is contended, on behalf of the appellant, that the words "all questions regarding the amount of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the suit and the execution of the decree," are wide enough to

embrace, and ought to be taken to embrace, the claims now under consideration. On the other hand, the learned counsel for the respondent insist that the word "payable" is to be read as "payable under the decree," and have cited numerous cases to show that, notwithstanding some earlier decisions to the contrary, all the High Courts of India have now accepted as settled law these propositions: 1st, that where the decree is silent touching interest or mesne profits subsequent to the institution of the suit, the Court executing the decree cannot, under the clause in question, assess or give execution for such interest or mesne profits; and 2nd, that the plaintiff is still at liberty to assert his right to such mesne profits in a separate suit. That this construction has now for several years prevailed in the High Court of Calcutta is shown by the Full Bench ruling of the 13th of September 1866—*Mosoodun Lall v. Bheekaree Singh* (1); the decision of the 18th of June 1868—*Haramohini Chowdhrian v. Dhanmani Chowdhrian* (2); and numerous other cases. That it has been adopted by the other High Courts is shown: as to that of the North-West Provinces, by the decision of the 10th of November 1869—*Chowdhree Nain Singh v. Jawahur Singh* (3); as to that of Madras, by the ruling of the 12th of February 1869—*Subba Venkataramaiyan v. Subraya Aiyar* (4); and as to that of Bombay, by the Full Bench ruling of the 10th of December 1867, in *Radhabai v. Radhabai* (5), followed by the decision of the 15th of June 1869 in *Sitaram Amrut v. Bhagvant Jaganath* (6).

The alleged *consensus* of the Indian Courts being thus established, their Lordships, whatever their opinion upon the construction of this clause might have been, had the question been *res integra*, do not think it would be right to run counter to so long a course of decision upon what is, in fact, merely a question of procedure,—it being admitted that the plaintiff may assert rights of this nature, if they exist, in a separate suit. They, therefore, accept the construction of the Indian Courts as settled law; and that acceptance, as was admitted at the bar, suffices to dispose of the claim to interest on the subsequent mesne profits which is raised by the present appeal.

It was, however, contended, as to the principal of the mesne profits in question, that the special circumstances of this case take the plain-

(1) B. L. R., Sup. Vol., 602.

(2) 1, B. L. R., A. C., 138.

(3) 1, All. H. C. R., 167.

(4) 4, Mad. H. C. R., 257.

(5) 4, Bom. H. C. R., A. C., 131.

(6) 6, Bom. H. C. R., A. C., 109.

tiff's claim out of the general rule ; and are sufficient to support the order of the Civil Court of the 31st of January 1872. And their Lordships will now proceed to consider what those circumstances are and the legal effect of them.

The decree of the 11th of June 1859 conclusively established the right of the plaintiff as against the defendant to a share in the lands forming part of the joint estate, and to the mesne profits attributable to that share for the Fusli year 1267, being the year next preceding the institution of the suit. His title, therefore, to the lands, of which he has obtained possession, and to mesne profits on those lands from a certain date, cannot be impugned. Had there been no appeal, and the decree had been followed by immediate execution, the plaintiff would have been put into possession of his lands, and would ever since have received the rents and profits of them. The only mesne profits touching which any question could have arisen, would have been those for the year which elapsed between the date of the institution of the suit and that of the decree. Execution was suspended, but not necessarily suspended, by the appeals, and the defendant could only remain in possession on the terms of giving security for the execution of the decree, should it be affirmed against him.

Such being the legal position of the parties, the plaintiff, on the 8th of December 1859, presented a petition to the Civil Judge of Cuddalore, claiming, in addition to the mesne profits specifically given by the decree, a certain sum as the then ascertained mesne profits for the Fusli year 1268 (being that which immediately followed the institution of the suit), and a further sum for the mesne profits not yet ascertained for the Fusli year 1269 ; and praying that, should the defendant fail to give security for the subsequent profits, security to abide the event of the appeals should be taken from the plaintiff, and that he should be allowed to take out immediate execution. A counter-petition was filed, and other proceedings had ; but ultimately an order of the Court was made, under which the defendant executed the instrument of the 26th of January 1860.

The Sudder Court made its decree disposing of the appeals in September 1860 ; and on the 11th of December in that year the plaintiff, contemplating the possibility of the appeal to Her Majesty in Council, which was afterwards preferred, made a second application to the Civil Court of Cuddalore, praying that the defendant might give further security to cover both the additional sum awarded to the plaintiff by the

decree of the Sudder Court, and the mesne profits of the lands for the current Fusli year 1270; and that in default of his doing so, security to abide the event of the appeal might be taken from the plaintiff, and he be allowed to execute the decree. Upon this second application an order of the Court was made, under which the defendant executed the further security of the 19th of March 1861.

The original defendant died, and the appeal was revived by the respondent as his son and heir some time in 1862.

On the 29th of January 1863, the plaintiff applied again to the Civil Court of Cuddalore, praying that the respondent, as the heir of the original defendant, should give security for the mesne profits for the Fusli years 1271 and 1272, with the usual alternative that, if he should fail to do so, security to abide the event of the appeal should be taken from the plaintiff, and he be allowed to have execution. On this application an order of the Court was made, under which the respondent executed the document dated the 25th April 1863.

That instrument is addressed to the Civil Court of Cuddalore, is entitled "a ready-money security bond respectfully executed by the respondent as son and heir of the original defendant," and is in these words:—

"Pursuant to the order passed by the Court requiring me to furnish security for the two Fuslis 1271 and 1272, the probable amount whereof has been put down at Rs. 9,880-12-11 for both the Fuslis, in original suit (O. S.) No. 1 of 1858 of the said Civil Court, I agree to pay up the same when the original decree comes to be executed. Failing to do so, I consent to my property hereunder mentioned being proceeded against, and the amount recovered. Deducting, therefore, from the said amount of Rs. 9,880-12-11, Rs. 4,616-15-11, which is the surplus in the security furnished in 1270, the remainder is Rs. 5,264-13-0; for this amount I give you a security lien upon the property hereunder mentioned, and indisputably belonging to my share." Then follows a list of property.

The two former instruments executed by the original defendant are substantially to the same effect. They are also addressed to the Civil Court; they contain an obligation to pay subsequent mesne profits for the years which they respectively cover, and point even more plainly to the ascertainment of the amount of such profits when the decree should come to be executed, and to their realisation, if not then paid, by the Court. The effect then of each document seems to be an under-

taking on the part of the person executing it, and that not by a mere written agreement between the parties, but by an act of the Court, that in consideration of his being allowed to remain in possession pending the appeal, he will, if the appeal goes against him, account in that suit, and before that Court, for the mesne profits of the year in question. That such was the understanding of the parties is shown by the earlier proceedings in execution, and in particular by the respondent's counter-petitions of the 13th of October 1864 and the 25th of April 1868. By the first of these the respondent, not disputing his liability for the six years' mesne profits claimed, though he did dispute his liability for interest thereon, offered terms of compromise, and only suggested that the account, by reason of its complexity, would be better taken in a regular suit. The second contains this statement :—"The plaintiff now claims mesne profits for the years subsequent to the decree. Though this petitioner is bound to pay the same, still the amount asked by the plaintiff is excessive, and has been fixed by him at his pleasure;" and then follows a plea *ad misericordiam*. The objection now taken to the recovery of these subsequent mesne profits by proceedings in execution was first taken by the respondent in the grounds of appeal filed by him in May 1872. That the respondent should have come under the obligation supposed; that the plaintiff should have failed to apply either to the Civil Court or to the Appellate Court for the amendment of the original decree by making it a decree for mesne profits subsequent to the institution of the suit; and that the respondent should have omitted, whilst the proceedings in execution in the Civil Court, to take the objection now taken to them, are all circumstances which the fact that up to December 1867 the wider construction for which the appellant contends was put upon the 11th section of the Act of 1861 by the Courts of the Presidency of Madras, and regulated their practice, goes far to explain. But if the respondent has contracted an obligation to account in this suit for the subsequent profits claimed, he cannot escape from it, because when he contracted it the course and practice of the Courts proceeded upon a construction of a Statute which has since been pronounced to be erroneous.

Their Lordships will now consider some of the objections which have been taken to the conclusion that the respondent has, by the proceedings in question, incurred the obligation supposed.

It was said that the last (so-called) "security bond" was alone the act of the respondent, and a distinction was taken between his obliga-

tion under that and those incurred by his father under the two other instruments. Their Lordships, however, observe that these are not mere bonds of the father, in respect of which the respondent as heir might be liable in the ordinary way. They are proceedings in Court importing a certain liability to be enforced in the suit against the defendant to that suit. By reviving the appeal, the respondent substituted himself for his father as defendant in the suit; and assumed the position of defendant with all the rights and liabilities which had previously attached to it. And that he intended to do so is further shown by the claim in his security bond to take credit for a sum which he alleged to be surplus security given by the preceding bond.

Again, it was suggested that the proceedings in the lower Court, which resulted in these security bonds, were irregular; that after the appeal to the High Court the power to allow or to suspend execution, and, in the latter case, to fix the terms on which execution should be suspended, belonged solely to the Appellate Court. Their Lordships are by no means clear that this objection is well founded; but whether it be so or not, it comes too late. It was never taken in the lower Court where the proceedings were had. There was no appeal from the orders of that Court, which directed security to be given. It would be in the highest degree unjust to allow such an objection now to prevail against the appellant.

Again Mr. Norton argued that the proceedings of the Civil Court of Cuddalore in the appointment of the commission and the assessment of mesne profits were irregular, because its powers were spent, at all events as to the mesne profits, by the execution issued by Mr. Ellis, the then Judge, in January 1865. Their Lordships can see no ground for this objection. It would seem that the intention of the Court, whether under Mr. Ellis, or his successor, Mr. Hodgson, was to give the plaintiff execution as prayed by his petition, but to give it piecemeal, and as it could conveniently be given. The order in question gave him execution for the ascertained sums to which he was entitled under the decree. In December 1865, he was under a later order put into possession of the land. The amount of the subsequent mesne profits could only be ascertained by inquiry. The same proceedings would probably have been had if the decree had expressly given the mesne profits subsequent to the institution of the suit under s. 196 of the Code of Procedure.

Upon the whole, their Lordships are of opinion that the respondent, by the proceedings in question, did come under an obligation to account

in this suit for the subsequent mesne profits of the appellant's land, which was capable of being enforced by proceedings in execution, notwithstanding the construction of the 11th section of the Act XXIII. of 1861, which now prevails in Madras. They conceive that this liability made the accounting "a question relating to the execution of the decree" within the meaning of the latter clause of the section. But even if it did not, they think that upon the ordinary principles of estoppel the respondent cannot now be heard to say that the mesne profits in question are not payable under the decree. Nor do they feel pressed by the observations made by Markby, J., in the case of *Ekowri Singh v. Bijaynath Chattapadhyaya* (1).

The Court here had a general jurisdiction over the subject-matter, though the exercise of that jurisdiction by the particular proceeding may have been irregular. The case therefore seems to fall within the principle laid down and enforced by this Committee in the recent case of *Pisani v. The Attorney-General of Gibraltar* (2), in which the parties were held to an agreement that the questions between them should be heard and determined by proceedings quite contrary to the ordinary *cursus curiæ*.

From what has been said it follows that, in their Lordships' opinion, the order of the High Court, which is under appeal, ought to be reversed. Their Lordships would have felt great regret in coming to the contrary conclusion. That proceedings begun in 1864, and for several years carried on without objection, should in 1875 be pronounced infructuous on the ground of irregularity, and the party relegated to a fresh suit in order to assert an indisputable right, would be a result discreditable to the administration of justice. In such a suit the plaintiff would probably find himself, either successfully or unsuccessfully, opposed by a plea of limitation. If such a plea were successful, great injustice would be done to the plaintiff; if it were unsuccessful, the respondent would probably find himself in a worse position than that in which he will be placed by the allowance of this appeal; since in such a suit the plaintiff might recover interest.

With the claim for interest made by the present appeal their Lordships have already dealt. They can see no grounds for the other objections taken by the appellant to the order of the Civil Court. They are of opinion, in particular, that, in the circumstances of the case, that Court could not have dealt otherwise than it has dealt with the plaintiff's share in the outstanding debts. On the other hand, the respondent has not insisted on any of the objections taken in his grounds of appeal to the High Court other than that on which the High Court made its order. Their Lordships, therefore, will humbly advise Her Majesty to reverse the order of the High Court of the 28th of June 1872, and in lieu thereof to order that the appeal against the order of the Civil Court of Cuddalore of the 31st of January 1872 do stand dismissed and the said order affirmed, and that each party do pay his own costs, both of the appeal to the High Court and of this appeal.

(1) 4, B. L. R., A. C., 111.

(2) L. R., 5, P. C., 516.

LAW AND FACT.

There is no distinction more important in legal proceedings than that which discriminates between Law and Fact. Two matters of investigation are presented to every Court, the one relating to what the Law has commanded or forbidden, the other dealing with the question whether some person indicated has done, or omitted, an act which falls under the classification of that which has been so forbidden, or enjoined. That it is wise to depute the duty of ascertaining the nature of the Law, from the responsibility of determining, whether or not a certain person has performed an act or omission attributed to him, has been for ages recognised by the legal methods of Great Britain. Nor is there anything insular in so acting. A distinction between the tribunals appointed to try questions of Law and Fact existed among the Romans, and obtained its clearest expression under their Formulary system. The modern course is to have Judges and Juries, the former being under an obligation to declare the Law, and the latter to arrive at the matter of Fact. Occasionally it has happened that juries have been so manifestly unwise in the performance of their duty, that a persuasion of their incompetence has become general. But it is worthy of remark that an erroneous judgment on their part has rarely ever been prejudicial to the liberty of the subject. Injustice may now and then be done by the adoption of too lenient a view, in regard to the guilt of a person accused, but it is almost an unheard-of thing for a jury to send an innocent man, or a man whose guilt rests on no truly satisfactory testimony, to punishment. This is the glory of the jury-system. That system has been called the palladium of British Liberty, and with justice in respect to some critical periods of British Constitutional History. But practically that system at the present day is as valuable as ever, though not precisely from the same cause. In the nineteenth century we look to our juries to save us from judicial blindness and caprice. Twelve men of business, who are more or less intimately acquainted with the world around them, are infinitely more competent to decide upon the truth or falsity of evidence given upon oath, than any judges can possibly be, whose minds may be powerful and acute, but who lack that experience of out-of-door life, which is necessary to enable any one to see clearly, how far certain classes of men are to be relied upon.

That we have not been making any rash assertion in regard to the value of the British plan of leaving a jury to arrive at Fact, while

judges are called upon simply to determine Law, the testimony of many of the ablest men that have sat on the bench at Westminster might be quoted. It will, however, be sufficient for our present purpose, if we make a short extract from Serjeant Stephen's great work on the laws of England. He says "in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice."

CALCUTTA HIGH COURT.

The 21st March and 10th April, 1876.

PRESENT :

The Hon'ble Sir R. Garth, Kt., *Chief Justice*, and the Hon'ble Mr. Justice Pontifex.

THE QUEEN, *vs.* HURRYBOLE CHUNDER GHOSE.

Confession made to a Police Officer who is also a Magistrate—Inadmissibility in Evidence—Sec. 25 and 26† of Act I. of 1872—Review—Criminal Case—s. 167‡ of Act I. of 1872—Section 26 of the Letters Patent.*

The terms of s. 25 of Act I. of 1872 are imperative and a confession made to a Police officer, *under any circumstances*, is not admissible in evidence. The 26th Section is not intended to qualify the 25th. The humane object of s. 25 is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them. It is an enactment to which the Court should give the fullest effect and there is no sufficient reason for reading the 26th section so as to qualify the plain meaning of the 25th.

* Section 25 of Act I. of 1872 No confession made to a Police Officer, shall be proved as against a person accused of any offence.

† Section 26 of Act I. of 1872.—No confession made by any person whilst he is in the custody of a Police Officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

‡ Section 167 of Act I of 1872.—The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court, before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

The Commissioner and Deputy Commissioner of Police are to be considered Police Officers in construing s. 25 of the Evidence Act.

Section 167 of the Evidence Act applies to civil as well as to criminal cases. The Court mentioned in that section which is to decide upon the sufficiency of the evidence to support the conviction is the *Court of Review*, and not the *Court below*.

Apart from s. 167 of the Evidence Act, s. 26 of the Letters Patent authorizes the High Court either to quash or confirm the conviction as they may think proper.

GARTH, C. J.—In this case, the prisoner Hurrybole Chunder Ghose was tried and convicted, at the February Sessions of the High Court, for using certain forged documents, and sentenced to ten years' transportation.

At the trial before Mr. Justice Macpherson, it was proposed on the part of the prosecution to put in a confession made by the prisoner. The confession was made, in the first instance, to two policemen, and taken down in writing, and the prisoner was then brought before the Deputy Commissioner of Police, Mr. Lambert, at the Police Office in Calcutta, where he again affirmed the truth of his former statement to Mr. Lambert, and Mr. Lambert, in his capacity of a Magistrate, received and attested the statement.

Upon this confession being tendered in evidence, it was objected to by the prisoner's Counsel, upon the ground that it was a confession made by the prisoner to a Police officer, and therefore not admissible, by reason of the 25th Section of the Evidence Act (I. of 1872).

In answer to this objection, it was urged on the part of the prosecution—1st, that Mr. Lambert was not a "Police Officer" within the meaning of the section; 2nd, that, if he were, the statement was made to him as a Magistrate, and not as a Police officer; and that the 2nd Section was intended to qualify the 25th, so as to make a statement even to a Police officer admissible, if made in the presence of a Magistrate.

The learned Judge at the trial admitted the evidence, and declined to reserve the point; but the Advocate-General having since given a certificate, under Section 25 of the Letters Patent of the High Court, that the point was a proper one to be considered, it has been brought before this Court for review, and has been well and fully argued before us.

It was urged by Mr. Jackson, for the prisoner, that the terms of Section 5 are imperative, that a confession made to a Police officer, *under any circumstances*, is not admissible in evidence against him, and that the 26th Section is not intended to qualify the 25th, but means

that no confession made by a prisoner in custody, to any person other than a Police officer, shall be admissible, unless made in the presence of a Magistrate.

I am of opinion that this is the true meaning of the 25th Section. Its humane object is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them. It is an enactment to which the Court should give the fullest effect, and I see no sufficient reason for reading the 26th Section so as to qualify the plain meaning of the 25th.

But then comes the question whether Mr. Lambert was a Police Officer within the meaning of Section 25.

It was argued, and with some force, that the term Police Officer did not mean a Deputy Commissioner of Police; that it comprised only that class of persons who are called in the Bengal Police Act (Act IV. of 1868) "members of the Police Force"; and that the object of the Evidence Act was not to prevent a gentleman in Mr. Lambert's position from taking a confession, but only ordinary members of the Police force, who are personally and constantly engaged in the detection of crime and the apprehension of offenders.

There is no doubt that, looking at the various sections of Act IV. of 1868 B. C., the Deputy Commissioner of Police is not a member of the Police force within the meaning of that Act, and, moreover, on looking back to the Police Act of 1861, it will be found that the term "Police officer," as used in that Act, has generally the same meaning as a member of the Police force in the Act of 1868; but, in construing the 25th Section of the Evidence Act of 1872, I consider that the term Police officer should be read not in any strict technical sense, but according to its more comprehensive and popular meaning.

In common parlance and amongst the generality of people, the Commissioner and Deputy Commissioner of Police are understood to be officers of Police, or in other words Police officers, quite as much as the more ordinary members of the force; and, although in the case of a gentleman in Mr. Lambert's position, there would not be, of course, the same danger of a confession being extorted from a prisoner by any undue means, there is no doubt that Mr. Lambert's official character, and the very place where he sits as Deputy Commissioner, is not without its terrors in the eyes of an accused person; and I think it better in construing a Section such as the 25th, which was intended as a wholesome

protection to the accused, to construe it in its widest and most popular signification.

I am of opinion, therefore, that the confession made by the prisoner in this case ought not to have been admitted at the trial.

But then comes the further very important question, what should be the effect of this improper admission of evidence on the proceedings?

The 167th Section of the Evidence Act provides that "the improper admission of evidence shall not be ground of itself for the reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision;" and I was certainly disposed to think, before hearing Mr. Jackson's argument, not only that this section applied to criminal as well as civil cases, but that the Court which had to determine whether, independently of the evidence objected to, there were sufficient materials to justify a conviction, was the Court below, before which the case was originally tried; and, upon this assumption, my learned colleague and I consulted Mr. Justice Macpherson, who certified that there was ample evidence in the Court below, independently of the admission, to justify the conviction in this case.

Mr. Jackson, however, desired to be heard upon the effect of Section 167, and he had urged upon us,—first, that the section does not apply at all to criminal cases, and, secondly, that, if it does, the Court to determine whether the conviction ought to stand, is not the Court which tried the case, but the Court before whom the point of the admissibility of the evidence was argued.

Mr. Jackson insisted that the word "decision" used in Section 167 was one inapplicable to a criminal case tried on the original side of this Court, and that it never could have been intended by the legislature that a case triable by a jury, and of the facts of which a jury alone are the proper judges, should be virtually re-tried by any Court not consisting of a jury; and in aid of his argument, he cited the case of *Regina vs. Navrojee Dada Bhai* (IX., Bombay L. R., p. 358.)

I am unable, however, to discover any sufficient reason why the 167th Section of the Evidence Act should not apply to criminal, as well as civil, cases. It is perfectly true that the word decision is more generally used as applicable to civil proceedings, but it is by no means inappropriate to criminal cases; and, if it was the intention of the legislature to use an expression which would apply equally to civil as to

criminal proceedings, there is properly no other word which would have answered their purpose better. Many other provisions of the Evidence Act apply equally to all judicial enquiries, and, if the nature of the mischief which the section was intended to remedy is considered, there is at least as much reason why it should apply to criminal as to civil proceedings. The Court have no power in a criminal case to order a new trial, and, if, in each instance where evidence is improperly admitted or rejected, the conviction is to be quashed, a lamentable failure of justice would often be the consequence.

I am of opinion that Section 167 does apply to criminal cases, but, upon consideration, I think that the court mentioned in that section which is to decide upon the sufficiency of the evidence to support the conviction is the *Court of review*, and *not the Court below*.

The point is certainly "raised," properly speaking, in the Court below, but it is both raised and argued in the Court of Appeal, and we think that the proper course of proceeding is for the Court of Appeal to decide upon the case, upon being informed from the Judge's notes, and, if necessary by the Judge himself, of the evidence adduced at the trial.

Apart, however, from Section 167 of the Evidence Act, I think that, under Section 26 of the Letters Patent, by virtue of which this case has been submitted to us for review, we have a right either to quash or to confirm the conviction, as we may think proper. The section enables the Court, after deciding upon the point reserved or certified, to pass such judgment or sentence as it may think right. If, therefore, upon reviewing the whole case, we are of opinion that, upon the evidence properly received, there is sufficient ground to convict the prisoner, I consider that we ought to allow the conviction to stand.

In the present case, therefore, we have obtained copies of the Judge's notes at the trial, and have also obtained further information from the Judge as to what particular portion of the evidence applied to the prisoner Hurrybole Chunder Ghose, and we are now prepared to hear the case argued upon its merits, as to whether there is sufficient evidence, apart from that improperly admitted, to support the conviction.

PONTIFEX, J.—I also am of opinion that the confession made by the prisoner in Mr. Lambert's presence ought not to have been admitted at the trial. Without going so far as to say that Section 25 of the Evidence Act renders inadmissible a confession made to any person connected with the Police, for there are cases in which a person holding high

judicial office has control over and is the nominal head of the Police in his district, I think that, in the present case, it was impossible for Mr. Lambert, residing in the house allotted to him as Deputy Commissioner of Police, and surrounded by Police immediately under his control, to divest himself of his character of a Police officer. I also agree that, under Clause 26 of the Charter, which clause deals with cases tried before a jury, we are bound to consider the admissible evidence in this case, and to pass such judgment and sentence as we shall think right, and I come to this conclusion without reference to Section 166 of the Evidence Act.

I agree that such last-mentioned section is applicable to criminal trials, but I have some doubt whether, if we were proceeding under it alone, we should be the proper Court to consider the sufficiency or insufficiency of the evidence in relation to the verdict.

GAMBLING.

The tendency to gamble seems irrepressible. First in one form, then in another, the passion springs up again after every attempt at its extinction. There would seem to be a charm about gambling for the inhabitants of every clime. It matters not where one goes, there are dice or cards, or the drawing of lots, or some other mode of appealing to the determination of Chance. People all over the world believe in a divinity whom they call Luck, and are scarcely happy if it be proposed to them to regulate all their acquisitions by the mere instrumentality of patient forethought. The Romans had a deep-seated reverence for the goddess Fortuna, and were not disposed to believe the modern doctrine that Providence is always on the side of the heaviest battalions. A story is told that one of their great generals once so far forgot what was due to the fickle goddess as to describe a certain victory he had won, with the addition that in that victory at least there was nothing due to Fortune. The fable is, he never succeeded again. The story shows the tenacity of the conviction held by the Romans that Fortune, Chance, or some power other than mere settled Law, had an influence on human affairs; and that kindred ideas still obtain everywhere is manifest from the prevalence of what is called gambling. Yet that the habit of gambling is prejudicial to the best interests of a Commonwealth is generally admitted. We see that little chinks widen, and that the man who trusts to Chance one day, in a slight matter, will place his reliance upon it another day in a more serious one. Characters under the in-

fluence of gambling may be continually seen, "going to the bad" as the phrase runs. Betting is a modern and English phase of this common proclivity, but fortunately the good sense of the community keeps the disposition in our part of the world within safe limits. Certainly here in India we suffer little from what has been, in the case of many men in England, a positive mania. Every one there knows of somebody or other, who has made away with a fine property by incessant betting. Now that the "pari mutuel" system has been introduced on to our Indian race-courses, the very moderate amount of speculation that has hitherto characterised the "turf" in this country may be expected to become still more sober and restrained. But while that is a circumstance to congratulate ourselves upon, it must be admitted that in another direction the gambling tendency is positively running wild. A few years ago Indian lotteries were small affairs. Now they are great ones, and people join them in the hope of winning hundreds of pounds. There is not much harm of a palpable kind about these race-lotteries. No one is ruined by the loss of few rupees. The mischief really and truly lies in the universal encouragement that is given to a mental mood that is not a good one, and which may bring larger evils in its train. Lotteries most certainly are not beneficial to the character of any one, and while the winners place money to their credit at the Bank they are morally worse off than they were before.

Section 294A of Act XXVII. of 1870 (the Penal Code) runs thus, "Whoever keeps any office or place for, the purpose of drawing any Lottery not authorised by Government shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

"And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, or any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery, shall be punished with fine which may extend to one thousand rupees."

Race lotteries seem to have a sort of prescriptive legality, if they do not possess any better title. But should their already too large figures be increased, legislature ought then to take measures against their prolonged existence, the more especially as they are, simply in a matter of fact light, quite indefensible for any figure large or small.

CALCUTTA HIGH COURT.

The 2nd December, 1875.

PRESENT :

Mr. Justice Macpherson and Mr. Justice Morris, Judges.

DYEBUKKE NUNDUN SEN* and another (*Defendants*) *Appellants*,*versus*MUDHOO MUTTY GOOPTA and another (*Plaintiffs*) *Respondents*.*Act XI. of 1865, ss. 6 and 12—Civil Court, Jurisdiction of—Mofussil Small Cause Court—Act XXIII. of 1861, s. 27—Special Appeal.*

A suit for a balance due on account of rents collected from the plaintiff's zemindaris by the defendants' father acting as agent of the plaintiffs, is a suit in which money is claimed as due on a contract within the meaning of s. 6, Act XI. of 1865. Where the amount claimed in such a suit does not exceed Rs. 500, it is cognizable by a Small Cause Court, notwithstanding it may be necessary to go into the accounts of both parties to determine what is due. Where such a suit for an amount under Rs. 500 is entertained by the Civil Court within the local jurisdiction of a Small Cause Court, a special appeal lies to the High Court, s. 27 of Act XXIII. of 1861 only applying to a suit which is properly brought in a Civil Court, because there is no Small Cause Court having jurisdiction to try it.

MACPHERSON, J.—We think that in this case the Munsif was right in holding that the proceedings throughout have been without jurisdiction, because the suit is of a class cognizable by the Small Cause Court of Rampore Beaulah, and is therefore one which, under s. 12, Act XI. of 1865, could not be heard or “determined in any other Court having jurisdiction within the local limits of the jurisdiction” of that Small Cause Court.

The suit is for a balance claimed to be due on account of rents of the plaintiffs' zemindaris collected by the father of the defendants. It is a suit in which money is claimed as due on a contract within the meaning of s. 6 of Act XI. of 1865; and therefore is a suit cognizable by the Small Cause Court, as the amount claimed did not exceed Rs. 500; and it is none the less cognizable by the Small Cause Court, because it may have been necessary to go into the accounts of both parties to see whether the amount claimed is really due or not. S. 6 contemplates the possibility of having to examine accounts between parties, for it says:—“The following are the suits which shall be cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract or for damages, when the debt, damage, or demand does not exceed in amount or value the sum of Rs. 500, whether on balance of account or otherwise.” The only balance of account excepted being “a

* Vide 1, Indian Law Reports, Calcutta Series, p. 123.

balance of partnership account, unless the balance shall have been struck by the parties or their agents."

In thus deciding, we are in accord with the decision of a Division Court in the case of *Joogul Kishore Roy v. Rughoo Nath Seal* (1). An order made by another Division Court, in the case of *Krishna Kinkur Roy v. Madhub Chunder Chuckerbutty*, may perhaps appear to decide the same question differently. But the Judges in the latter case merely concurred in the opinion of the Judge of the Small Cause Court, who made the reference to this Court. The opinion was that the suit (which involved intricate accounts) should be tried by the ordinary Civil Court, and not by the Court of Small Causes. The technical question of jurisdiction was not raised either by the Judge of the Small Cause Court or by this Court; and the whole matter seems to have been treated more as one of convenience than of strict law. Moreover, no one appeared to argue the case in the High Court.

It is said that, as the present case has been tried by the Civil Court, we have no right to meddle with its decision, because s. 27, Act XXIII. of 1861, says:—"No special appeal which shall lie from any decision or order shall be passed on regular appeal by any Court subordinate to the High Court, in any suit of the nature cognizable in Courts of Small Causes, when the debt, damage, or demand for which the original suit shall be instituted shall not exceed Rs. 500, but every such order or decision shall be final." But s. 27 of Act XXIII. of 1861 applies only to a suit which is properly brought in a Civil Court, because there is no Small Cause Court having jurisdiction to entertain it. Where a Small Cause Court has been constituted, that Court alone has jurisdiction in a certain class of cases. But where no Small Cause Court has been constituted, that same class of cases must be brought in the ordinary Courts. If they are properly brought in the ordinary Courts by reason of there being no Small Cause Court having jurisdiction, then (and then only) s. 27 of Act XXIII. of 1861 is applicable. That section is not to be construed as meaning that, if a suit is improperly brought in a Civil Court which has no jurisdiction to entertain it, instead of in a

(1) Special Appeal No. 757 of 1872, heard before Jackson and Mitter, JJ., on the 24th April 1873.—This was a suit to recover Rs. 428, balance of account due from the defendant, who had been employed by the plaintiff as an agent to look after his law suits, and receive and disburse money connected with such suits, the defendant receiving a monthly salary. It was held that it was a suit within the meaning of s. 6, Act XI. of 1865, and therefore no Special Appeal would lie. See also *Proswanno Chunder Roy v. Sreenath Sreemancee*, 7, W. R., 422 (Jackson and Markby, JJ.)

Small Cause Court which has jurisdiction, the parties cannot come up in a special appeal to have the matter set right (1). We have no doubt that a special appeal does lie in such cases.

We set aside the decree of the Subordinate Judge. The appeal is allowed, and the plaintiffs' suit dismissed, on the ground that it ought to have been brought in the Small Cause Court of Rampore Beaulah, and that the Munsif had no jurisdiction. The plaintiff must pay the costs of this appeal and of the proceedings out of which this appeal arises, that is to say, of the last hearing before the Subordinate Judge.

CALCUTTA HIGH COURT.

The 6th and 13th September, 1875.

PRESENT :

Mr. Justice Phear.

MOKOONDO LALL SHAW* and another (*Plaintiffs*),

versus

GONESH CHUNDER SHAW and another (*Defendants*.)

Hindu Law—Will—Clause restraining Partition or Enjoyment.

Where a Hindu testator gave all his immoveable property to his sons, but postponed their enjoyment thereof by a clause that they should not make any division for twenty years, *Held* that the restriction was void as being a condition repugnant to the gift, and that the sons were entitled to partition at once.

PHEAR, J.—The testator directs his eldest son to pay out of the profits of his business Rs. 200 a month for the family expenses of his sons, if they remain living in commensality, or Rs. 70 a month to himself, Gunesh Chunder, and Rs. 43 and odd annas to each of the three other sons if they separate. This is to go on for twenty years, Gonesh Chunder managing the property ; meanwhile, if he dies, the next son in succession is to be manager and so on, and the rest of the profits over and above the Rs. 200 per month are directed to be invested and accumulated. Then the testator declares [read portions of the 1st and 5th paras. The first paragraph of the will contains “ After twenty years from my death my sons will be at liberty to divide and take the aforesaid business, but before the aforesaid twenty years (have elapsed) my sons will not be competent to divide the capital stock and profits of the aforesaid business, and the business will not be made liable for their respective debts.

(1) See *Tarini Charan Mookerjee v. Rajah Poorno Chunder Roy*, 6, B. L. R., 717, where, however, the order setting aside the decree was made under the 15th section of the High Courts' Act.

* *Vide* 1, Indian Law Reports, Calcutta Series, p. 104.

The 5th para. was as follows :—" Whatever other immoveable property, &c., I have besides the said business, I give to my sons in equal shares ; as soon as they wish they may divide and take it in equal shares. But after the lapse of twenty years from my death, my eldest son Gonesh Chunder and his heirs becoming rightful proprietors, will get a 5-anna share of the whole of my aforesaid business and the profits thereof and the property which has been purchased with the said profits : of the remaining 11-anna share Mokoondo Lall and his heirs will get a 4-anna share, Promodee Lall and his heirs a 3-anna share, and Nrigendro Lall and his heirs a 3-anna share."

I entertained some doubts at first whether the passages which I have read amounted to any disposition of the property other than the Rs. 200 a month during the period of twenty years. The words " neither he nor any of my other sons shall acquire any rights therein" seemed to exclude the supposition that they were intended to have any interest in the business during that time, and some of the words of paragraph 5 to some extent confirmed that view. On the other hand, the substance of paragraph 5 seems to contemplate that the property is given at once in specified shares to the sons ; and there would be a very considerable inconvenience on the body of the will on any other interpretation. I have come therefore to think that the words " neither he nor any of my other sons shall acquire any rights therein" mean rights of immediate enjoyment. The accumulations which are directed to be made and invested are ultimately given to the sons in the same shares as the original property ; and on the whole, I think, the true construction of the disposition is that the testator gives all his property in these businesses to his sons in the shares which are specified in para. 5 ; but postpones their enjoyment of this property for twenty years subject only to the monthly gift of Rs. 200 to the sons jointly for household expenses, or in the shares I have already mentioned in the event of their living separate. Now, without saying that a Hindu testator might not give the current profits or income of the property to the trustees and direct them to apply this to the payment of debts throughout a specified period, as twenty years, I do not think it is competent to him to give the corpus of the property to an adult person and at the same time to forbid that person from enjoying the property in the way which the law allows. The prohibition against receiving and enjoying the income for twenty years appears to me simply to be a condition imposed on the property which is repugnant to the gift. It is not merely the giving

of one portion of the property to one person or purpose, and the remaining portion to another person or purpose; but it is giving the entire property to one person and coupling this gift with a prohibition against his enjoyment. The attempt to do this is I think void in law. The result is that, on this will as I construe it, the parties to the suit are immediately entitled to the businesses subject only to the direction with regard to the application of Rs. 200 per month for household expenses. I think therefore they are entitled to the partition.

HIGH COURT, N. W. P.

The 26th August, 1875.

PRESENT :

(Mr. Justice Turner, *Officiating Chief Justice*, and Mr. Justice Oldfield.

UDA BEGUM, (*Plaintiff*)

versus

IMAD-UD-DIN* and others, (*Defendants*.)

Equitable Estoppel—Laches—Acquiescence—Limitation.

The plea of acquiescence is applicable to suits for which a fixed term of limitation is prescribed by law, but mere delay in enforcing a right does not constitute acquiescence. (*Rama Rau v. Raja Rau* (1), impugned : *Peddamuthulaty v. N. Timma Reddy* (2), approved with certain qualifications.)

The defendants took possession of, and erected buildings on, land which they knew belonged to the plaintiff and they had no claim to, without applying to the plaintiff for consent. The plaintiff abstained from suing to eject them for one or two years, knowing that the defendants were building on the land.

Held, under the circumstances, that the delay in the institution of the suit was not sufficient to deprive the plaintiff of her right to relief.

In this case, the plaintiff was a zemindar; and she being a *parda-nashin*, her affairs were managed by her son. The suit related to a plot of land situated within two miles from her residence; it was formerly granted to a tenant for the erection of certain kucha buildings thereon, but the tenant having deserted, the plaintiff took possession of it; the defendants thereafter dispossessed her and having entered on the plot erected on it certain kutchas and pukka buildings without her consent. The plaintiff sued to eject the defendants and to remove the materials they had brought upon the land. The defendants among other pleas objected that in as much as the plaintiff had known of the erection of the house and had not interfered to prevent it, she must be

* Vide 1, Indian Law Reports, Allahabad Series, p. 82.

(1) 2, Mad. H. C. R., 114. (2) 2, Mad. H. C. R., 270.

taken to have acquiesced in it, and had thereby lost her right to the relief sought. The Lower Courts found that the plaintiff had through her son the means of knowing of the erection while in progress, and hence inferred her knowledge and from her knowledge and inaction, that she had tacitly consented to it and therefore dismissed the suit. The plaintiff appealed to the High Court. †

The judgment of the Court (after setting out the facts of the case) was as follows:—

The rulings of the Sudder Court as to the effect of delay in the assertion of a right have been considerably modified or explained by more recent decisions of this Court, which have, however, we believe, escaped the observation of the reporter. We propose, therefore, in disposing of this case, to examine at somewhat greater length than we should have otherwise thought it necessary to do the principle on which the rule of estoppel *in pais* appears to rest, and the circumstances to which it should be applied. This rule has been stated generally in the following terms:—"If a man by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induced others to do that from which they might otherwise have abstained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given credit to his words, or to the fair inference to be drawn from his conduct." And again:—"If a party has an interest to prevent an act being done and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had it been done by his previous license."—*Cairncross v. Lorimer* (1).

Mr. Justice Story points out the principle on which the rule rests, and it is most important that the principle should be borne in mind in applying the rule:—

"This doctrine of estoppels *in pais*, or equitable estoppels, is based upon a fraudulent purpose, and a fraudulent result. If, therefore, the element of fraud is wanting, there is no estoppel. As if both parties were equally conscious of the facts, and the declaration, or silence, of the one party produced no change in the conduct of the other, he acting solely on his own judgment. There must be deception, and change of conduct in consequence, to estop the party from showing the truth."—

(Story's Equity Jurisprudence, vol. ii., s. 1543). Of course by fraud the author must be understood to mean whatever amounts in law to fraud.

In *Ramsden v. Dyson* (1) Lord Chancellor Cranworth and Lord Wensleydale declared that if a stranger builds on the land of another supposing it to be his own, and the owner does not interfere, but leaves him to go on, equity considers it dishonest in the owner to remain passive and afterwards to interfere and take the profit. But if a stranger builds on the land of another knowingly, there is no principle of equity which prevents the owner from insisting on having back his land, with all the additional value which the occupier has imprudently added to it; and Lord Wensleydale added that, if a tenant does the same thing, he cannot insist on refusing to give up the estate at the end of his term. It was his own folly to build.

These dicta of the highest authority illustrate the application of the general rule. There must be something more than a mere delay in instituting proceedings to deprive a man of his legal remedies. We are not, indeed, prepared to adopt without qualification an opinion thrown out by the High Court of Madras, "that the equitable doctrine of laches and acquiescence is not applicable to suits in the Mofussil for which a period of limitation is provided by the Limitation Act."—*Rama Rau v. Raja Rau* (2).

The rule as expounded by the authorities we have quoted is obviously founded on a highly equitable principle, and we see no reason why on fitting occasions it should not be applied in this country. No doubt a distinction must be made between those cases in which a suitor seeks some relief which, if he proves his case, the Court is bound to grant him, and the cases in which he seeks relief which the Court has discretion to grant or refuse. When a suitor has a right to demand relief, no doubt a stronger case must be made out against him than such mere tardiness in seeking a remedy which might justify a Court in refusing relief when it has a discretion to grant or refuse it. With this qualification we assent to the dictum of the Madras High Court in a case decided subsequently to *Rama Rau v. Raja Rau* (3) to the effect that "on the whole it may be taken as the law both of Courts of law and equity that mere laches, short of the period prescribed by the statute of limitation, is no bar whatever to the enforcement of a right absolutely vested in the plaintiffs at the period of suit."—*Peddammuthu*.

(1) L. R., 1, H. L., 129; 21, Jur., N. S., 506; 14, W. R., 926.

(2) 2, Mad. H. C. R., at p. 116. (3) 2, Mad. H. C. R., 114.

laty v. N. Timma Reddy (1) ; but where there is more than mere laches, where there is conduct or language inducing a reasonable belief that a right is foregone, the party who acts upon the belief so induced, and whose position is altered by this belief, is entitled in this country, as in other countries, to plead acquiescence, and the plea if sufficiently proved ought to be held a good answer to an action, although the plaintiff may have brought suit within the period prescribed by the law of limitation. In the case before us it has been found that the appellant, knowing that the respondent was building on her land, abstained from commencing proceedings for one or two years. The respondents have set up a title to the land which has been held to be manifestly false. They must have known they had no claim to it, and they could hardly have doubted it belonged to the zemindar. Had they thought it probable the zemindar would consent to their usurpation, they might have assured themselves on the point by applying to her before they expended a rupee on the land. Under the circumstances, we cannot hold that the delay in the institution of the suit is sufficient to deprive the appellant of her right to relief.

The appeal is decreed with costs, and so much of the decrees of the Courts below as dismissed the claim to the plot in question in this appeal are reversed, and the claim is decreed.

BOMBAY HIGH COURT.

The 8th December, 1875.

PRESENT :

The Hon'ble Mr. Justice West and Nanabhai Haridas, *Judges.*

REG *vs.* DEVAMA* and SOMSHEKHAR.

The Code of Criminal Procedure (Act X. of 1872) ss. 215 and 296—Compounding of offences—Revival of Prosecution—"Dismissal" of a warrant case—Practice—Counsel.

A warrant case of a nature not compoundable under s. 214 of the Indian Penal Code was "dismissed" on the parties coming to an amicable settlement.

Held that the "dismissal" was equivalent to a discharge under s. 215 of the Code of Criminal Procedure, and the composition did not affect the revival of the prosecution, if that should otherwise be thought necessary or expedient.

Counsel cannot claim as of right to be heard on a reference to the High Court under s. 296 of the Criminal Procedure Code.

(1) 2, *Mad. H. C. R.*, at p. 273.

* *Vide* 1, *Indian Law Reports, Bombay Series*, p. 61.

The following statement of the facts seems necessary :—

In the year 1874, a respectable lady named Subhadra, complained against one Devama and her son Somshekhar, that they broke into her residence and abstracted her ornaments to the value of Rs 7,000. Somshekhar asserted that he was the owner of the place as well as of the property as he was adopted by the complainant. The case was dismissed, the Magistrate recording the following order :—

“ They (the parties) have now come to an agreement, and Subhadra has withdrawn her complaint on condition that she receives certain ornaments and a certain ‘ sari,’ which the other party agree to give her. I have, therefore, given these articles to her, and the rest to Somshekhar and Devama, and I dismiss the case.”

Subsequently disagreements having arisen an application was made to revive the prosecution and the case was sent to the High Court under Section 296 of the Code of Criminal Procedure Code.

PER CURIAM.—The accusation made against the accused in this case constituted it a warrant case falling under the provisions of Sections 213 *et seq.* of the Code of Criminal Procedure. The Magistrate, Mr. Middleton, after an arrangement had been come to between the parties, divided the property between them and dismissed the complaint. By “dismiss the case” we understand the Magistrate to have meant the same thing as is indicated by Section 215 of the Code of Criminal Procedure, where it says that “the Magistrate, if he finds that no offence has been proved against the accused person, shall discharge him.” “Dismissal of a complaint” is a phrase properly applicable only to a summons case under Chapter XVI. of the Code, and incapable of being applied, as Section 212 shows, to any complaint, “except in so far as it refers to a summons case.” The provisions of Section 215 are highly useful in many cases. They enable a Magistrate, when circumstances make it expedient, to dispose of an accusation without proceeding to an actual conviction or acquittal where a strict application of the criminal law would be undesirable. But these provisions are open to abuse, and, to guard against their perversion, it is explained (Explanation II.) that a discharge is not equivalent to an acquittal, and does not bar the revival of a prosecution. In the present case, therefore, the course pursued by Mr. Middleton, and which seemed to him the more just and expedient, does not bar the renewal of the proceedings, if to Mr. Jervoise or the Magistrate of the District such a renewal should appear absolutely necessary or highly desirable.

The composition entered into between the parties cannot affect the revival of the prosecution if that should otherwise be thought necessary. House-breaking in order to commit theft is not an offence which, according to Section 214, Penal Code, can be legally compounded, and a withdrawal from the prosecution in such a case has not, according to Section 188 of the Code of Criminal Procedure, the effect of an acquittal. Section 212 of the Criminal Procedure Code cannot be applied to the case, because it is not a summons case, and there is no provision as that contained in Section 212 in the following chapter on warrant cases.

There is no occasion for any order on the part of this Court. The case stands free for the exercise of the Magistrate's discretion, which he will naturally not exercise to the supersession of his predecessor's order, unless it should appear that justice requires him to adopt that course.

SHORT NOTES.

CALCUTTA HIGH COURT.

Act XXVII. of 1860—Review.

A review of judgment is admissible in proceedings under Act XXVII. of 1860, although no express provisions for reviews are contained in the Act.

Vide 1, Indian Law Reports, Calcutta Series, p. 101, (Glover and Mitter, JJ). The 25th August, 1875—Poona Koorer (Petitioner.)

Appeal—Letters Patent, 1865, cl. 15—Act VI. of 1874—Order granting Appeal to Privy Council.

Under cl. 15 of the Letters Patent, no appeal lies to the High Court from an order of the Judge in the Privy Council Department, granting a Certificate that a case is a fit case for appeal to Her Majesty in Council.

Vide 1, Indian Law Reports, Calcutta Series, p. 102. (Macpherson, Offg. C. J., and Jackson, J). The 23rd June, 1875—Mowla Buksh.

Hindu Widow—Property purchased from the proceeds of the estate devised—Inheritance.

Where an estate was given to the widow with power to use the proceeds as she chose, it was held by the Privy Council that the pro-

ceeds or property purchased by her out of the proceeds would belong on her decease to her heirs.

Vide 1, Indian Law Reports, Calcutta Series, p. 104, Privy Council.—The 4th and 5th June, 1875—Bhagbuti Dey.

Hindu Law—Age of Majority of Hindus—Act XL. of 1858—Unconscionable Agreement—Usury.

A Hindu, resident and domiciled in Calcutta, and possessed of lands in the mofussil, borrowed in Calcutta a sum of money from the plaintiff, a professional money-lender, and agreed by his bond to repay the principal with interest at 36 per cent. per annum in Calcutta. The defendant's age, at the time he executed the bond, was sixteen years and one or two months; but neither his person nor his property had been taken charge of by the Court of Wards, or by any Civil Court. The defendant having made default in payment, the plaintiff brought the present suit. The defendant pleaded his minority.

Held by the Full Bench that the law as to the age of minority governing the case was not Act XL. of 1858, but the Hindu Law, under which the defendant was not a minor at the time he executed the bond, and that therefore he was liable on it.

On the merits of the case the lower Court (Phear, J.) found that the agreement was unconscionable, and one which a Court of Equity would not enforce. *Held* by the appeal Court (Garth, C. J., and Macpherson, J.) in accordance with the decision of Phear, J., that the plaintiff was only entitled to a decree for the amount actually received by the defendant from him, with interest at 6 per cent.

Vide 1, Indian Law Reports, Calcutta Series, p. 108. Full Bench (Sir R. Garth, C. J. and Jackson, Macpherson, Markby and Glover, JJ.) The 30th November and 2nd December, 1875.—Mothoormohun Roy *vs.* Soorendronarain Deb.

Appeal—Act XXVII. of 1860—Deposit of Security by Person entitled to a Certificate.

No appeal lies under Act XXVII. of 1860 on a question of the deposit of security by a person who has been declared entitled to a certificate under the Act.

Vide 1, Indian Law Reports, Calcutta Series, p. 127 (Glover and Mitter, JJ.) The 20th August, 1875—Monmohenee Domesee.

BOMBAY HIGH COURT.

Hindu Law—Decree—Interest—Rule of ‘damdupat’, not applicable to amounts due on decrees.

The rule of Hindu Law, which limits the amount recoverable at one time by way of interest to the amount of the principal, does not apply to an amount recoverable in execution of the decree of a Civil Court.

Vide 1, Indian Law Reports, Bombay Series, p. 73. (West and Nanabhai Haridas, JJ.) The 15th December, 1875—Balkrishna Bhal Chandra vs. Gopal Raghunath.

Kabulayatdar Khot—Dharekaris—Occupant—Bombay Act I. of 1865, s. 2, Cls. J, K, and L., and Section 48—Regulation XVII. of 1827, s. 3, Cl. 1, and Section 5, Cl. 2—Inferior and Superior Holder—Privity of Estate.

Regulation XVII. of 1827, s. 5, enables the Government, and therefore, the holder of the rights of Government, on failure of the superior holder to pay the land revenue, to realize it from the inferior holder.

The laws for realizing the land revenue establish a kind of privity of estate between the superior and inferior holders, by which the latter, taking the profits of the land, must satisfy the obligations of the former to Government, independently of, and even in opposition to, any agreement between the two contracting parties. The liability to pay, adheres to the occupation and enjoyment, and cannot be got rid of, except through its resignation by the sovereign or the sovereign's representatives.

Held, accordingly, that when the person who was the “occupant” of certain land within the meaning of the Bombay Survey Act failed to pay the revenue due thereon, the *Kabulayatdar Khot* might recover the amount from that person's mortgagee in possession.

Vide 1, Indian Law Reports, Bombay Series, p. 70 (West and Nanabhai Haridas, JJ.) The 30th November, 1875—Krishnaji Ravji Godbole vs. Ram Chundra Sadashiv.

Registration—Act XX. of 1866. ss. 17 and 18—Deed of Partition.

Section 17 of Act XX. of 1866 extends to a deed of partition, and this is not prevented by such an instrument being enumerated in s. 18 amongst those which are optionally registrable.

Vide 1, Indian Law Reports, Bombay Series, p. 67, (West and Nanabhai Haridas, JJ.) The 14th December, 1875.—Shankar Ram Chundra vs. Vishna Anant.

Limitation—Decree—Execution—Application—Act XIV. of 1859—Act IX. of 1871.

An application for execution of a decree was made in February 1868, and proceedings sufficient to bar limitation under Act XIV. of 1859 were going on till 30th September 1871. The next application for execution of the decree made in October 1872 was held to be barred under Act IX. of 1871, as more than three years had elapsed on that day from the date of the application in February 1868.

Held also, following *Gouree Sankar vs. Arman Ali* (21, W. R., 309), that an informal application, made on the 30th September 1871, in the nature of a petition to the Subordinate Judge to give effect to the application of February 1868 by overruling certain objections of the Collector and enforcing execution of the decree, was not an application for the execution of a decree such as could bar limitation under Act IX. of 1871.

Vide 1, Indian Law Reports, Bombay Series, p. 59, (West and Nanabhai Haridas, JJ.) The 6th December, 1875—*Jibhai Mahipati vs. Parbhu Bapu*.

HIGH COURT, N. W. P.

Act VIII. of 1859, s. 2—Res judicata.

When a plaintiff claims an estate, and the defendant, being in possession, and knowing that has two grounds of defence raises only one, he shall not, in the event of the plaintiff obtaining a decree, be permitted to sue on the other ground to recover possession from the plaintiff. (*Woomatora Debia*, 11, B. L. R., (P. C.) 158).

Where, therefore, the defendants purchased an estate in the plaintiff's possession and sued him to recover possession of it, and the plaintiff resisted the suit merely on the ground that he was the auction-purchaser of it, and the defendants obtained a decree, and the plaintiff then sued claiming a right of pre-emption in respect of the property, a claim which he might have asserted in reply to the former suit, *held* that he was debarred from suing to enforce such claim.

Vide 1, Indian Law Reports, Allahabad Series, p. 75, (Turner, Offg. C. J., and Spankie, J.) The 20th August, 1875—*Baldeo Sahai vs. Bateshar Singh*.

Mitakshara—Hindu Law—Undivided Hindu Family—Ancestral Immovable Property—Rights of father and son.

The sons in an undivided Hindu family, although they have a proprietary right in the paternal and ancestral estate, have not independent dominion.

Where, therefore, the plaintiff sued to eject the defendant, his son, from a portion of a house, partly self-acquired by the plaintiff and partly ancestral property, in which the defendant was living against the plaintiff's will, the Court decreed the claim.

Vide 1, Indian Law Reports, Allahabad Series, p. 77, (Turner, Offg. [•] C. J. and Oldfield, J.) The 26th August, 1875—Baldeo Das *vs.* Sham Lal.

Contract—Act IX. of 1872, s. 72—Liability of Person to whom Money is paid by Mistake.

A treasury officer, under the imposition of a gross fraud, paid money to the defendant, who was the innocent agent of the person who contrived the fraud. In paying the money the treasury officer neglected no reasonable precaution, nor was he in any way guilty of carelessness.

Held that the defendant was bound to repay the money received by him, and that he could not defend himself by the plea that he had paid it to his principal: nor could the Court allow that the circumstances that the principal was himself a servant of the plaintiff, and in the course of his employment obtained facilities for committing the fraud, relieved the defendant from his liability.

vide 1, Indian Law Reports, Allahabad Series, p. 79, (Turner, Offg. C. J. and Oldfield, J.) The 26th August, 1875—Shugan Chand *vs.* The Government, N. D. W.

Carrier—Duty of Persons sending goods of a dangerous nature—Notice—Act XVIII. of 1854, s. 15—Act XIII. of 1855—Negligence—Action for Compensation for destruction of life.

Held (Pearson, J. dissenting) that a person who sends an article of a dangerous and explosive nature to a Railway Company to be carried by such Company, without notifying to the servants of the Company the dangerous nature of the article, is liable for the consequences of an explosion, whether it occurs in a manner which he could have foreseen as probable, or not.

Held, also (Pearson, J. dissenting), that such a person is liable for the consequences of an explosion occurring in a manner which he could not have foreseen, if he omits to take reasonable precautions to preclude the risk of explosion.

Mode of estimating damages under Act XIII. of 1855 discussed.

Vide 1, Indian Law Reports, Allahabad Series, p. 60 (Stuart, C. J., and Pearson, Turner, Spankie and Oldfield, JJ.) The 1st June, 1875—Lyell *vs.* Ganga Dal.

ON COLEBROOKE'S TRANSLATION OF THE DĀYA-BHĀGA.

The treatise with which we have headed this article has formed, since it was published, we believe towards the end of the last century, the main authority for that branch of the Hindu law of inheritance which obtains among the people of Bengal. By 'authority' we mean the source from which the law is drawn as it is judicially administered in the Courts established by the British Government. That it has given a generally correct version of the celebrated work of Jimútavāhana, there is no denial: nor would the outline of the Bengal law of inheritance, which may be deduced from a study of the translation be conspicuously erroneous. But if any one tolerably acquainted with that peculiar style which has been adopted by the writers of institutes of law in Sanscrit, compares the translation of Colebrooke with the original, he will find some reasons for being dissatisfied with the translation. It ought to be remembered, that in Sanscrit, style or phraseology varies far more in the different branches of learning than it seems to do in other languages, for instance in English. Thus one pretty well conversant with what are called the Belle-Lettres in Sanscrit, the works of the poets and of such prose writers as these are, and works on Rhetoric or the Art of Poetry need not be ashamed if he does not understand a page of any work on Philosophy, Logic or Law; for Sanscrit is an extremely cultivated language, and every branch of learning, such as Poetry, Rhetoric, Logic, Metaphysics, Grammar and so forth, has been so minutely systematised that no one uninitiated in the rudiments or rather in the main features of a particular branch can make anything out of a special treatise on that branch, from his general knowledge of the Sanscrit language and literature. Thus Professor Max Müller of England is an unrivalled Vedic Scholar; but it would be no wonder, nor would it be any depreciation of his vast knowledge of Sanscrit, if he were found tripping in a simple verse from Kalidasa. In the same manner, Sanscrit law is a particular study; that a man is a good scholar in Sanscrit Poetry or Sanscrit Logic or Philosophy would be no testimony to his ability to grapple with the problems of Hindu Law; unless indeed he has had good instruction and taken the pains of learning the subject by the help of a teacher. People ordinarily overlook this circumstance; although they are keenly alive to the absurdity of a good Shakespear reader or a good scholar in mental philosophy

setting up as a lecturer on Blackstone or on the statute law of England. As regards Sanscrit law the absurdity would be greater, for in English a good general scholar would find little difficulty in understanding Blackstone or the language of the modern statutes at least; whereas a good scholar in Sanscrit literature would find it rather tough, to get at the meaning of even the first twenty lines of the *Dāya-bhāga* of *Jīmūta-vāhana*.

It is not the intention of the foregoing remarks to imply that Colebrooke had not studied to very good purpose the Sanscrit Law books. On the contrary, our impression is, that he had very good instruction, and that even while writing his valued compilations of Hindu Law, he constantly had at his elbow competent Pundits to explain to him the difficult passages and the technical terms. But these Pundits being unacquainted with the English, they had no means of verifying what was reproduced in English at their suggestion or by their instruction. Thus slight errors have crept in in the translation, and although the substance generally of the paragraphs into which the translator of the *Dāya-bhāga* divided the treatise for the sake of easy reference, has been pretty correctly given, it would not be an exaggeration to say that the manner of the original is hardly maintained sufficiently for the purpose of keeping the reader constantly on the watch that he is reading a work which was not English originally and that he must be cautious how he understands the meaning of the expressions occurring in the work.

It must also be recollected that in the days when Colebrooke wrote, the reading of the Europeans in Sanscrit had not much advanced, and the advantages of mutual help and mutual criticism among different scholars were altogether wanting. Thus a solitary scholar, translating a work on an abstruse subject in a strange and hitherto unknown and very difficult language would be likely to fail in fulfilling all the requirements of a proper translation. Especially a law-book, which is intended to be put to practical use in judicial administration, would seem to require a very cautious and careful handling. The *Dāya-bhāga* of *Jīmūtavāhana* has become something like a statute on the Bengal law of inheritance. In the administration of that law by the Courts of Bengal every word and every sentence in it may be weighed and pondered and subjected to contradictory interpretations as the words of a statute are. Thus the simple definition of what 'gift' is, contained in the above work, has been converted by the ingenuity of Sir Barne

Peacock into a lever for overturning the whole fabric of Bengal testamentary law; though we do not mean to insinuate hereby that the doctrine for the first time propounded by the late Chief Justice is not correct according to the true principles of Hindu law. However that be, what we were going to observe was this that considering to what a minute and jealous interpretation the words of the *Dāya-bhāga* are liable to be subjected, the translation of Colebrooke is not a sufficiently precise representation of what is to be found in the original. No one would miss the absurdity and ridiculousness of an old class Munsif who does not know English descanting elaborately on the expressions of his Bengali Civil Procedure Code, and interpreting the same into bold propositions of Procedure Law; yet, the quality of training apart, a European Judge not knowing Sanscrit is hardly in a more advantageous position as regards Hindu Law than our imaginary Munsif is as regards Procedure Law. But the absurdity becomes still more glaring if the translation upon the basis of which the constructions of Hindu Law are made is evidently not a very close one, nor professes to give anything but the substance of the original.

That Colebrooke's translation is liable to the above observations we might verify if we compare only a few pages of it with the original. But sometimes the translation is defective in more serious points; in fact, it is positively erroneous, and would cause a perversion of the substantive law. By a brief search we have gathered what we give below as instances of the inaccuracies of Colebrooke's translation of *Jīmūta-vāhana's Dāya-bhāga*.

Chapter V., para. 7, enumerates some of the persons who are disqualified for inheritance. Among them are those who are called in Sanscrit *Nirindriya*, which word Colebrooke has translated as "persons who have lost a sense." This is evidently inaccurate. The word '*Nirindriya*' means, as every body knows, 'a person without a sense;' it does not imply that he once had that sense, and then lost it. Thus it might be contended, according to Colebrooke's translation, that a person who is born without a sense is not disqualified. It is true that such cases do not often arise; but that is no reason why law should be inaccurately laid down.

Again Chapter XI, Section 1, para. 64. This is the translation given of a text of Narada. "When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property and care of herself, as well as in her maintenance, they have full

power." Now what has been rendered as 'care of herself' should be 'care of the wealth.' According to Colebrooke's translation one might suppose that the husband's kin are entitled to the custody of her person.

Chapter XI., Section 1, para 2.

The late Mr. Justice Dwarkanath Mitter pointed out that two words *patibrata* and *sadhwi*, i. e.,—'devoted to husband' and 'chaste' have been altogether slurred over in the portion which begins

"Dying before her husband, a virtuous wife &c. &c". *Vide* 19, W. R., 372.

We do not mean to say that this has led to the decision of the great unchastity case in the manner the Full Bench have decided it; but what we cannot but suppose is that such inaccuracies, if often repeated, tend to engender wrong ideas as to the views of the Hindu Lawgivers in the mind of those who have no access to the original.

Chapter IV., Section 3, para. 29.

"Therefore the property goes first to the whole brothers; if there be none, to the mother; if she be dead, to the father." Here "If she be dead" is the rendering of what ought to have been "In default of the mother". In Sanscrit, the word is 'abhāva' or 'failure', and includes any kind of failure, whether by death, or by degradation or by relinquishment of the world. According to Colebrooke's translation, one might contend, that as regards the succession of the mother to her daughter's Stridhun, her right does not cease by her relinquishing the world or by being degraded. It would not do to say that degradation has ceased to have any effect on proprietary rights since the passing of Act XXI. of 1850; or that relinquishment of the world would be hardly allowed by the Courts of these days to have its declared legal effects. Whatever may be the legitimate results of later enactments or later decisions, they ought not to obtain colour from erroneous translations of the original writings on Hindu Law.

In para. 31 of the same chapter, same section, we find, "If there be no issue of their bodies, nor son of a rival wife, nor daughter's son, nor son of those persons, the sister's son and the rest shall take their property." Here, what has been rendered as "issue of their bodies" is in Sanscrit the well known *aurasa* son. Now, a son would not be called *aurasa*, unless he be legitimate offspring, *Vide* Manu (IX., 166); but there is no indication in the translation of that qualification. "Issue of their bodies" might be construed as any issue, legitimate or illegitimate; that it would be repugnant to Hindu feelings, that it would be against

the spirit of the manners and customs, and views and ideas of the Hindu Society, would not receive any very great consideration as a *ratio decidendi* in the eyes of the Judges of these days.

The above are but a small proportion of what might be pointed out as grave shortcomings in Colebrooke's translation of the *Dāya-bhāga*. It is apparent that in the days of Colebrooke, translations from Sanscrit were not subjected to such canons of criticism as have latterly obtained currency. We would not hesitate to say that if Max Müller were set to examine Colebrooke's translation of the *Dāya-bhāga*, he would hardly express satisfaction with it; this we gather from the very careful manner in which he has rendered even very insignificant scraps of Sanscrit metrical composition, which he had occasion to quote in his works relating to Sanscrit language and literature. As to Goldstücker he did speak forth; had he been living now, he would most probably have undertaken a recast of the *Dharmasastra* compilations, and we doubt not that he would have performed the task in a most satisfactory manner. His laborious and painstaking study of the Grammar of Panini, and his extensive readings in the *Mimāṃsa* literature had been just the kind of previous training, which would have most stood him in stead in the performance of such a task. The *Mimāṃsa* works are the repository of the rules of interpretation in Sanscrit; the authors of Digest in Sanscrit are fond of illustrating their doctrines by citing those rules. Few would have been more at home in such passages of the Sanscrit Digests and Commentaries as contain allusions to the rules of *Mimāṃsa*. It is to be regretted therefore that the project of Goldstücker has been cut short by his untimely death. It is high time however, that some means should be adopted to point out how far the current translations of Hindu Law are not the exact copies of what is contained in the original. It is much to be desired that some competent man should undertake the task, even if it be in the way in which Hughton revised the translation of *Manu* by Sir William Jones.

PRIVY COUNCIL.

The 11th November, 1875.

PRESENT :

Sir J. W. Colvile, Sir B. Peacock, Sir M. E. Smith and Sir R. F. Collier.

*On Appeal from the Calcutta High Court.*KRISHNA BEHARI ROY* (Plaintiff) *Appellant*,*vs.*BUNWARI LALL ROY and another (Defendants) *Respondents*.*Act VIII. of 1859, s. 2—Cause of Action—Res Judicata.*

B, as adopted son and heir of G, instituted a suit to set aside certain putni leases, under which certain persons claimed to hold lands which had belonged to G. The defence was, that B was not the legally adopted son of G, and an issue on this point having been settled, K, who claimed to be the reversionary heir of G, was made a defendant under s. 73 of Act VIII. of 1859; and it was eventually decided in that suit that B was the duly adopted son of G. *Held* that a subsequent suit by K against B to set aside the adoption could not, on the principles laid down in the case of *Scorjeemones Davee vs. Suddanund Mohapatter* (12, B. L. R., p. 304), be maintained.

Kriparam vs. Bhagwan Doss (1, B. L. R., A. C., 68) over-ruled.

SIR M. E. SMITH.—This was a suit brought by the appellant, claiming to be the heir of Goursoondur Roy, to set aside an adoption of the respondent Bunwari Lall, alleged to have been made by the widow of Goursoondur Roy. One of the defences set up by Bunwari Lall and by his mother, who was joined in the suit as a defendant, was that the question of the validity of the adoption of Bunwari Lall had been already decided in a former suit, to which the present appellant Krishna Behari Roy was a party. An issue was raised upon that defence. Now it appears that a former suit had occurred which was of this nature; Bunwari Lall had brought an action against some patnidars who claimed under patni leases granted by his adoptive mother. The ground on which he sought to set aside the leases was, that she had exceeded her power in granting them, inasmuch as she had only a widow's estate. It is not necessary to state more respecting the object of that suit. An issue was raised in it upon the question whether Bunwari Lall had been validly adopted. The present appellant and plaintiff Krishna Behari Roy intervened in that suit, upon the ground that he was the heir of Goursoondur Roy, and, as the heir, had a right to intervene to dispute the title of Bunwari Lall as his adopted son. It does not appear very

* *Vide* 1, Indian Law Reports, Calcutta Series, p. 144.

clearly at what period of the suit that issue was raised—whether before or after Krishna Behari Roy intervened—but undoubtedly it was raised, and is in substance the same as the issue raised in the present suit. The issue was tried, and the Principal Sudder Ameen found against the intervener and in favor of the adoption. He also found in favor of the patnidar that the patni could not be set aside. The patnidar having a decision in his favor; was, of course, satisfied with that decree, but Krishna Behary Roy being dissatisfied with the finding upon the issue as to the adoption, appealed to the Civil Judge. On this appeal the decision of the Principal Sudder Ameen was affirmed. Again he appealed from the Civil Judge to the High Court, which, after fully hearing the case upon the issue of adoption, affirmed the decisions of the Courts below. There exists, therefore, a final and complete judgment upon the issue raised either at the instance of Krishna Behary Roy, or which he adopted, on the very question which he seeks again to raise in this suit.

Both the Courts below have held that the present suit is barred by reason of the judgment in the former one. The ground of the present appeal is that they are wrong, in as much as it is said, that the case does not come within s. 2 of Act VIII. of 1859. Now the section is this:—"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim." Their Lordships are of opinion that the expression "cause of action" cannot be taken in its literal and most restricted sense. But however that may be, by the general law, where a material issue has been tried and determined between the same parties in a proper suit, and in a competent Court, as to the status of one of them in relation to the other, it cannot, in their opinion, be again tried in another suit between them.

It is not necessary for their Lordships to go at length into the reasons for their decision, because those reasons appear in a recent judgment of this Board in the case of *Soorjeemonee Dayee vs. Suddanund Mahapater*. In that judgment it is said, after reference to the second clause of Act VIII, "Their Lordships are of opinion that the term 'cause of action' is to be construed with reference rather to the substance than to the form of action, and they are of opinion that in this case the cause of action was in substance to declare the will invalid, on the ground of the want of power of the testator to devise the property

he dealt with. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Procedure would by no means prevent the operation of the general law relating to *res judicata*, founded on the principle '*nemo debet bis vexari pro eadem causa.*' This law has been laid down by a series of cases in this country with which the profession is familiar. It has probably never been better laid down than in a case which was referred of *Gregory vs. Molesworth*, in which Lord Hardwicke held that where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions, the greater part of which will be found noticed in the very able notes of Mr. Smith to the case of the *Duchess of Kingston.*"

A decision of the High Court of Bengal has been referred to, the case of *Kriparam vs. Bhagwan Doss*, as having a contrary tendency. All their Lordships desire to say of it is that, as reported, it does not appear to be consistent with their judgment in the former appeal to which they have referred, nor with their opinion in the present case. The decision is of so recent a date that they desire to say no more upon it.

On reference to some notes of Mr. Broughton on this section of Act VIII. of 1859, it appears that the decisions have not been uniform in the Courts in India. Several of them are opposed to that referred to.

It was suggested by Mr. Cave that the former judgment ought not to be binding, because certain witnesses having been examined before the present appellant intervened in the suit, he was refused the opportunity of cross-examining them. Their Lordships think that such an objection is no answer to the defence arising from the former judgment. If there had been any miscarriage of that kind, the matter was one for appeal in that suit. The objection does not appear to have been raised in the appeals which were successively made in that suit to the Civil Judge and to the High Court; but whether it was so raised or not, their Lordships think that they cannot affect the operation of the final judgment, which must be taken to have been rightly given.

In the result, their Lordships will humbly advise Her Majesty to dismiss this appeal, and to affirm the judgments below with costs.

PRIVY COUNCIL.

The 2nd and 3rd July, 1875.

PRESENT :

Sir J. W. Colville, Sir B. Peacock, Sir M. E. Smith, and Sir R. P. Collier.

*On Appeal from the Calcutta High Court.*BAIJUN DOOBEE* and others (Defendants) *Appellants*,*versus*BRIJ BHOOKUN LALL AWASTI (Plaintiff) *Respondent*.*Hindu Widow—Sale of Right, Title, and Interest of Widow—Execution of Decree—Arrears of Maintenance—Rights acquired by Auction-Purchaser.*

C, a Hindu, inherited from his father property charged, under the Mitakshara law, with the maintenance of *N*, his mother. *C* dying without issue, his property passed to *D*, his widow, who allowed the maintenance of *N* to fall into arrears. *N* brought a suit against *D* personally for the amount of the arrears, and obtained a money decree, in execution of which, *D*'s right, title and interest in the property left by her husband were sold. Neither the decree nor the sale proceedings declared the property itself to be liable for the debt. In a suit by the reversionary heir of *C*, after the death of *D*, to establish his right of inheritance to, and to recover possession of, *C*'s estate, *Held* that the purchaser at the execution-sale took only the widow's interest, and not the absolute estate, and therefore the plaintiff was entitled to recover.

SIR B. PEACOCK.—This is a suit brought by Brij Bhookun Lall against Baijun Doobey, to declare his right to the inheritance of Lot Moranwan and to obtain possession of that estate. The plaintiff claims the estate by right of inheritance from Chintamun as reversionary heir after the death of Doorga Konwar, the widow of Chintamun. The defendant claims by purchase under an execution of a decree against Door-ga, the widow, and the question is, whether, under that decree, only the widow's interest or the absolute estate was sold. If only the widow's interest, then upon the death of the widow the plaintiff succeeded to the estate as reversionary heir of Chintamun, and is entitled to recover; if, on the other hand, the whole interest passed under the sale, then the plaintiff as reversionary heir upon the death of the widow took no interest, but the estate passed to the defendant Baijun by reason of his purchase under the decree.

Now it appears that Sheo Churn and Muddun Mohun two brothers, the sons of Deo Kishen, separated in estate. Muddun Mohun took

* *Vide* 1, Indian Law Reports, Calcutta Series, p. 133.

one share of the estate and Sheo Churn the other. Muddun Mohun therefore obtained a separate estate. The lands are situate in the District of Gya, and are subject to the rules of the Mitakshara law. Muddun Mohun having got this separate estate died leaving two sons, Balgobind and Chintamun; Balgobind died childless, and the whole estate came to Chintamun. Chintamun consequently acquired the estate by inheritance, and it was ancestral estate derived from the father, Muddun Mohun. Chintamun died childless, leaving two widows, Doorga Konwar and Radha Konwar. Muddun Mohun, the father, left a widow, who was the mother of Chintamun. The mother, Net Konwar, the widow of Muddun Mohun, was entitled to be maintained out of the estate held by Chintamun. The maintenance of Net Konwar, the widow of Muddun Mohun, was a charge upon the inheritance which came from Muddun Mohun. The liability to maintain the mother passed to Chintamun when he got the estate of his father, and when the estate passed from Chintamun to his widow, the liability to maintain Net Konwar still attached to the inheritance, and Doorga was bound to maintain her out of the inheritance. It appears that she allowed the maintenance of the mother, which had been fixed by the two brothers at Rs. 200 a year, to fall into arrear for about five years, making Rs. 1,000 for the five years. In consequence Net Konwar brought a suit against her personally for the amount due for maintenance with interest.

The plaintiff obtained a decree, whereby it was ordered that the plaintiff should recover from the defendant on account of her claim Sicca Rs. 1,033-5-6, which is equivalent to Co.'s Rupees 1,102-3-6. The plaintiff prayed that the defendant be ordered to pay that amount, and by the decree it was ordered that the plaintiff do get from the defendant that amount.

Now the decree being a personal decree against the widow, according to the case of *Kistomoyee Dossee vs. Prosunno Narain Chowdry* (6, W. R, 304), all that would be sold under it was the interest of the widow. It was there held that where only the rights and interests of a Hindu widow in the property left by her husband were sold in execution of a decree against her on account of a debt contracted by her, and neither the decree nor the sale proceedings declared the property itself liable for the debt; the purchaser obtained an interest in the estate only during the widow's life-time. This was a personal debt of the widow, and there is nothing to show that the estate of Muddun Mohun was charged by the decree. The sale against her in discharge of her per-

sonal liability was of the interest which belonged to her, and not of the estate which belonged to her husband. It was the widow's property only that was liable to be sold, or was sold, in discharge of her personal debt.

The notification of the sale under the decree was that a sale would be held of whatever right and interest the judgment-debtor had in the estates. It does not say that it is to be levied by sale of the husband's assets, but that it is to be realized by the sale "of whatever right and interest the judgment-debtor had in the estate." Then it is specifically pointed out: "Besides the right and interest of the judgment-debtor the right and interest of no other person will be sold at the said auction." The right and interest of the judgment-debtor which was to be sold, was that to which she was entitled, that which was liable to make good her default in non-payment of the maintenance. The sale took place under that notification, and it is clear, if that is important, that Brij Bhookun, the plaintiff, understood that what was to be sold was the widow's estate, not his own reversionary interest as the heir of his uncle. He wanted to sell the widow's estate, not his own interest. The real question is what was liable to be sold under the decree, and what in fact was sold. The purchaser may have made a mistake. He may have thought that the Court was selling something which they did not sell, but he was informed distinctly by the notification that the Court was selling the interest of the defendant in the estate, and that besides that interest no other interest was being sold. The appellant having purchased the interest of the judgment-debtor, obtained a certificate of the purchase, which stated that whatever right, title, and interest the judgment-debtor had in the said property had ceased from the date of the sale, and had become vested in the auction-purchaser.

It appears therefore to their Lordships that what was intended to be sold was the widow's interest only and not the absolute estate in the lot, and that, consequently, upon the death of the widow, the lot descended to the plaintiff as the reversionary heir of her husband, and that the purchaser did not obtain the absolute estate, but only the widow's interest in it, which continued only so long as the widow lived.

Several cases have been cited. The first case which was referred to was the case of *Ishan Chunder Mitter vs. Buxh Ali Sowdagur* (Mar., 614). That case was fully gone into, and it was explained in the course of the argument that the suit was against the widow not in her own right as widow, but as representative of her son. In that case the widow had no

estate at all to be sold, and when the decree and the order for sale are examined, it is clear that what was intended was the sale of the interest of the debtor: that was the interest of the son to whom the widow was the guardian; and when it was said that the interest of the defendant was sold, the widow's interest was not intended, but the interest of the person who was liable, and that was the son. That decision was referred to and approved by this Board in the case of *The Manager of the Darbhanga Raj vs. Moharajah Coomar Ramaput Sing* (10, B. L. R., 294). It appears to their Lordships that those cases are no authorities to show that, under the judgment and execution in this case, anything further passed to the purchaser than the widow's interest. Then two cases were cited, one *Tiluck Chunder Chuckerbutty vs. Muddun Mohun Jogee* (15, B. L. R., 143). That was a very different case from the present. It was there held, that "where a widow's estate is sold for arrears of rent, it is not merely the widow's life-interest that is transferred, and the reversionary heir cannot follow the estate after her death." There the widow was sued for rent under Act X. of 1859. S. 105 of that Act enacts that, "if the decree be for an arrear of rent due in respect of an under-tenure which by the title-deeds or the custom of the country is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execution of the decree." The rent was due to the landlord. He recovered a decree, and under it the tenure, not the widow's interest, was sold.

The other case which was cited was *Anund Moyee Dosse vs. Mohendro Narain Doss* (15, W. R., 264). That was the case of a suit brought for arrears of rent. It was there held, that "when neither the Hindu widow who has succeeded by inheritance, nor the reversioner, chooses to pay the arrears of rent which have fallen due upon a tenure, the tenure, if sold for such arrears, passes to the purchaser by the sale;" that is to say, if the rent is not paid, the tenure is answerable, and the landlord has a right to look to the tenure. Those cases therefore are not at all applicable to the present and are no authorities in favor of the defendants.

Then another case was cited which, in their Lordships' opinion, bears out the position already laid down. It is *Nogendro Chunder Ghose vs. Sreemuttee Kaminee Dossee* (11, Moore's I. A., 241). It was there held that the decree in that case was not a decree against the land but a personal decree. It bears out the view which their Lordships have taken with regard to this decree, that it was a decree in a suit against the widow personally; that the decree was against her personally; that

the attachment was to sell her property, that is, the interest which belonged to her in the estate, and which was liable to make good her default.

Looking, therefore, to the whole case, their Lordships are of opinion that the decision of the High Court was correct, and they will humbly recommend Her Majesty that that decree be affirmed, with costs of this appeal.

MOFUSSIL PLEADERS.

Mr. Justice L. S. Jackson of the Calcutta High Court, in speaking of Mofussil Pleadors, said* "In England, no doubt, the law is that parties are bound not merely by admissions, but by the view taken of their cases, and the mode of conducting them by their counsel at the trial.

In the Mofussil Courts, no doubt, particular acts done within the conditions of the vakalutnamah, and admissions of fact by the pleader, are binding on the client,† but we cannot hold that the client is bound by the mistaken consent of his pleader to abide by issues of law erroneously framed by the Judge, and not properly arising in the case.

There is but a slight analogy between a Barrister in English Courts of Justice and a Mofussil Pleader.

The former is usually entrusted with the conduct of a cause (through an attorney), by reason of his learning and ability; he is responsible to the Court, and to the profession of which he is a member, for his professional conduct, and he has well-known privileges and immunities.

The Vakeel is simply the representative of the suitor, possessed of his personal confidence, and in direct communication with him, but having neither in theory nor in fact the learning and the varied experience of the English Barrister.

The pleader is presumably well acquainted with the facts of the case in which he is employed, and he is bound to an honest care for his client's interest; but although of late years efforts have been made to ensure his having a rudimentary knowledge of the law, it is certain that those efforts have been only partially successful, and especially that no rule of practice can be laid down which is based on the presumed legal science of the Mofussil practitioner.

I say Mofussil practitioner, because these observations are not meant to apply to the Native Bar in the Appellate High Court, nor do

* 2, Wym. Rep., Civil Rulings, p. 173.

† See cases cited in Macpherson's Civil Procedure, 4th edition, page 409, notes A. & C.

I deny there are honorable exceptions even in the interior ; but any one who is at all acquainted with the Mofussil Courts, is aware that, generally speaking, the possession of the commonest text books by pleaders there is quite exceptional, and it might be possible to find some who are not even possessed of the Act VIII. itself.

Regulation XI. of 1806, Section 12, Clause 2 (which appears to be still in force), directs the Zillah Judges to require the Native pleaders of their respective Courts to take copies of the translation of any Regulations which relate, directly or indirectly, to the administration of civil justice.

And Regulation XXVII. of 1814, Section 40 (repealed only last year by Act XX. of 1865), contained the following provision :—‘ That the pleaders in the several Courts, as well as other persons, may have it in their power to render themselves acquainted with the Regulations enacted by the British Government, there shall be kept, for public inspection in the several Courts of Judicature, printed copies of all such Regulations and of the translations in the native languages. And on receipt of the translation of the Regulations in the country languages, the Courts of Justice were to cause them to be publicly read, and to require the native pleaders to take copies,’ &c., &c.

And very mainly, no doubt for this reason, the Legislature has, in the Code of Civil Procedure, imposed upon the Courts themselves the responsibility of conducting suits in every stage.

Emphatically so as to the framing of issues, which, under the present as well as the former procedure, is exclusively the business of the Court.

By Section 38, Act XXIII. of 1861, the procedure prescribed by Act VIII. of 1859, is to be followed, as far as it can be, in all miscellaneous cases and proceedings which, after the passing of the Act, may be instituted in any Court.

The mode in which issues are to be framed under that Act is to be found in the Sections 139—141,* which clearly shew that this is exclusively the function of the Court. Section 139 declares that the Court may frame the issues from the allegations of fact which it collects from the oral examination of the parties or their pleaders, notwithstanding any difference, &c. This clearly shews that the pleader may bind his client by a statement of matter of facts, but nothing is said of issues or admissions of law.”

* The only cases in which the issues are not directly framed by the Court are those provided for by Sections 142 and 143.

SHORT NOTES.

CALCUTTA HIGH COURT.

Bills of Exchange Act (V. of 1866)—Suit on Promissory Note payable by Instalments.

Where a promissory note is payable by instalments, and contains a stipulation that, on default in payment of the first instalment, the whole amount is to become due, a suit to recover the whole amount on default made in payment of the first instalment cannot be brought under Act V. of 1866.

Vide 1, Indian Law Reports, Calcutta Series, p. 130. (Phear, J.) The 12th January, 1876—*Remfry vs. Shillingford*.

Appeal to Privy Council—Dismissal of Appeal for Default in Deposit of Security, and in transcribing Record—Act VI. of 1874, ss. 11, 14 and 15.

On an application to stay proceedings in an appeal to the Privy Council, which had been presented on the 2nd July 1874 from a decision of the High Court on its Original Side, it appeared that no deposit had been made by the appellant to defray the costs of transcribing, &c., as provided by s. 11, Act VI. of 1874; that no steps had been taken to prosecute the appeal; and that no security had been deposited for the costs of the respondent, since the petition of appeal was presented. The Court granted a rule calling on the appellant to show cause why the proceedings on appeal should not be stayed, and on his not appearing to show cause, ordered that the appeal should be struck off the file.

Vide 1, Indian Law Reports, Calcutta Series, p. 142. (Phear, J.) The 24th January, 1876.—*Thakoor Kapalinath Shahai vs. The Government*.

Succession Act (X. of 1865) s. 56—Revocation of Will—Lawful Polygamous Marriage.

The will of a Jew, made subsequently to his first marriage, but previously to a second marriage in the life-time of his first wife, *held* to be revoked by such second marriage under s. 56 of the Succession Act.

Vide 1, Indian Law Reports, Calcutta Series, p. 148. (Phear, J.) The 13th December, 1876—*Gabriel vs. Mordakai*.

Succession Act (X. of 1865) s. 258—Grant of Letters of Administration with Will annexed—Practice.

Letters of administration with the will annexed may, under s. 258 of the Succession Act, be granted after the expiration of seven clear days from the death of the testator.

Vide 1, Indian Law Reports, Calcutta Series, p. 149. (Phear, J.) The 1st February, 1876.—*In the case of Willson deceased*.

Will, Attestation of—Succession Act (X. of 1865) s. 50—Hindu Wills Act (XXI. of 1870) s. 2.

By the Succession Act, s. 50, no particular form of attestation is necessary : therefore, where to a document purporting to be her last will and testament the name of a testatrix was written by A, and the testatrix then, in his presence, affixed her mark, and A in her presence wrote beneath it, "by the pen of A ;" and the testatrix was then identified to the Registrar, who was present, by B, who had seen her affix her mark to the document, and who in her presence put his signature as having identified her, *Held* a sufficient attestation, and probate was granted.

Vide 1, Indian Law Reports, Calcutta Series, p. 150. (Phear, J.) The 20th and 22nd December, 1875—*In the goods of Roymoney Dossee.*

BOMBAY HIGH COURT.

Court Fees Act VII. of 1870, s. 16—Pauper Respondent—Memorandum of Objections—Civil Procedure Code (Act VIII. of 1859) s. 348—

Pensions Act XXIII. of 1871, ss. 4, 5, 6, 8, 9 and 14—

Certificate by Collector.

A pauper respondent is not entitled to present objections at the trial of an appeal without payment of stamp duty.

S. 4 of the Pensions Act XXIII. of 1871 debars the Civil Court from taking cognizance of any suit, whether the Government is a party to it or not, which relates to any pension or grant of money or land revenue conferred or made by the British or any former Government—without a certificate from the Collector or other authorized officer. Section 5 prescribes a remedy for the claimant of such pension or grant, and section 6 enables the revenue officer to refer the parties to the Civil Court for the determination of their respective interests in the income or other benefit, which the executive will, however, still, as against either or both of the litigants, be at liberty to allow or to withhold.

Lands held free of assessment under a grant from Government, which bestows on the grantee the lands themselves and not merely the Government revenue arising from them, do not fall within the provisions of the Pensions Act.

Vide 1, Indian Law Reports, Bombay Series, p. 75. (West and Nanabhai Haridas, JJ. The 20th December, 1875, *Babaji Hari vs. Rajaram Ballal.*

Decree of Bombay Small Cause Court—Power to proceed against immoveable property.

Although the Court of Small Causes at Bombay has power to enforce its decree against moveable property only, yet if that decree be transmitted to a Court to which the Code of Civil Procedure applies, the latter can, under Section 287 of that Code, enforce it against immoveable property also.

Vide 1, Indian Law Reports, Bombay Series, p. 82. (West and Nanabhai Haridas, JJ.) The 19th January, 1876.—*In Re Jag-jivan Nanabhai*.

Res judicata—Section 2 of Act VIII. of 1859—First suit against defendants as principals—Second as agents.

A previous suit in which the plaintiff elected to sue the defendants as principals bars a second suit on the same contract in which the same defendants are charged as responsible agents under a trade usage.

Vide 1, Indian Law Reports, Bombay Series, p. 87. (West and Nanabhai Haridas, JJ.) The 24th January, 1876.—*Devray Krishna vs. Halambhai*.

HIGH COURT, N. W. P.

Execution of Decree—Limitation—Act IX. of 1871, s. 15.

Held, (Stuart, C. J., dissenting) that applications for execution of decrees are not “suits” within the meaning of s. 15, Act IX. of 1871. (*Vide* 24, W. R., p. 405, Bancekanto Ghose;—contra 24, W. R., p. 303, Rajah Promotho Nath Roy.)

Vide 1, Indian Law Reports, Allahabad Series, p. 97. (Full Bench.) The 5th August, 1875.—*Jewan Singh vs. Saruan Singh*.

Stat. 24 and 25 Vic., c. 104, s. 15—Powers of Superintendence of High Court—Revision of Judicial Proceedings—Jurisdiction.

The High Court is not competent, in the exercise of the powers of superintendence over the Courts subordinate to it conferred on it by s. 15 of 24 and 25 Vic., c. 104, to interfere with the order of a Court subordinate to it on the ground that such order has proceeded on an error of law or an error of fact.

Where, therefore, on appeal by the judgment-debtor against an order confirming a sale of immoveable property in the execution of a decree, the lower Court set aside the sale, on a ground not provided by law, and the auction-purchasers applied under the above-mentioned section to the High Court to cancel the lower Court's order, the High Court refused to interfere. (*Vide* 2, B. L. R., A. C., 165; 23, W. R., 402.)

Vide 1, Indian Law Reports, Allahabad Series, p. 101. (Full Bench.) The 10th August, 1875.—*Tej Ram vs. Harsuk*.

Hindu Law—Undivided Hindu Family—Inheritance.

When, in an undivided Hindu family living under the Mitakshara law, a brother dies without leaving issue, but leaving brothers, and nephews, the sons of a predeceased brother, the interest in the joint estate of the brother so dying does not pass on his death to his surviving brothers, but

on partition of the whole estate, including the interest of the brother so dying, is divisible; and the right of representation secures to the sons or grandsons of a deceased brother the share which their father or grandfather would have taken, had he survived the period of distribution.

Madho Singh, *vs.* Bindessery Roy, (H. C. R., N. W. P., 1868, p. 101) over-ruled.

Vide 1, Indian Law Reports, Allahabad Series, p. 105. (Full Bench.) The 27th August, 1875—Debi Persaud *vs.* Thakur Dial.

Redemption of Mortgage—Limitation—Acknowledgment of Title of Mortgagor or of his right to Redeem—Act IX. of 1871, Sch. II., Art. 148.

Where the defendants attested as correct the record-of-rights prepared at a settlement with them of an estate in which they were described as mortgagees of the estate, but which did not mention the name of the mortgagor, *held* (Spankie, J., dissenting) that there was an acknowledgment of the mortgagor's right to redeem within the meaning of article 148, sch. ii. Act IX. of 1871.

Per PEARSON, J.—That there was also an acknowledgment of the mortgagor's title.

Vide 1, Indian Law Reports, Allahabad Series, p. 117. (Full Bench.) The 27th August, 1875.—Dala Chand *vs.* Sarfraz.

Principal and Surety—Clerk of the Small Cause Court—Bond for Performance of Duties of Office—Liability of Surety—Act XI. of 1865, ss. 45, 51—Small Cause Court Judge—Principal Sudder Ameen (Subordinate Judge)—Jurisdiction.

Held that, in permanently investing, under s. 51, Act XI. of 1865, the Judges of the Courts of Small Causes at Agra, Allahabad and Benares, with the powers of a Principal Sudder Ameen (Subordinate Judge), the local Government did not exceed its power or contravene the law, although the occasional investiture of Small Cause Court Judges by name from time to time, with the powers of a Principal Sudder Ameen, may have been the mode of procedure contemplated by the legislature as the one likely to be ordinarily adopted (*Mussaumut Bijee Kooer vs. Rai Damodar Doss* (H. C. R., N. W. P., 1873, p. 55, impugned).

The defendant and J. W. C., Clerk of the Small Cause Court at Allahabad, entered into a bond to the Judge of the Small Cause Court, as well as to his successors in office, in a certain sum as security for the true and faithful performance by J. W. C. of his duties as Clerk of the said Court, and for his well and truly accounting for all moneys entrusted to his keeping as such Clerk of the Court. *Held*, in a suit against the defendant as surety, that he was liable for misappropriation by J. W. C. of moneys arising from sales of moveable property held in execution of decrees passed by the Judge of the Small Cause Court in the exercise of his powers as Subordinate Judge, and that, had the Small Cause Court Judge not been invested, at the time of the execution of the bond, with the powers of a Subordinate Judge, the defendant's liability in respect of such moneys would not have been thereby affected.

Vide 1, Indian Law Reports, Allahabad Series, p. 87. (Turner, Offg. C. J., and Pearson and Oldfield, J.) The 31st August, 1875—Crosthwaite *vs.* Hamilton.

PRIVY COUNCIL.

The 17th December, 1875.

PRESENT :

Sir James W. Colville, Sir Barnes Peacock, and Sir M. E. Smith.

*On Appeal from Calcutta High Court.*JUNESWAR DASS* (for Self and as Guardian of CHUNDEE COOMAR) Defendant, (*Appellant*)*versus*MAHABEER SINGH, RAM ADHEEN SINGH and others, Plaintiffs, (*Respondents*.)*Limitation—Mortgage Bond—Act XIV. of 1859, sect. 1, cl. 12.*

In a duly registered mortgage bond dated the 21st of June, 1856, the obligor covenanted to repay principal moneys and interest in Jeyt 1274 F. S., and mortgaged certain specified lands as security. The lands so pledged were subsequently sold to the Appellant in execution of a decree obtained upon another bond made by the obligor, subsequent and subject to the former.

In a suit brought on the 30th August, 1871, against the obligor and the Appellant to recover the amount due on the first bond from the former personally, and also by sale of the mortgaged lands, it was contended that the suit was barred under cl. 16, sect. 1 of Act XIV. of 1859 :—

Held, that the suit, being for the recovery of immoveable property, or of an interest in immoveable property, and founded not upon the contract to pay the money but upon the hypothecation of the land, fell within cl. 12, sect. 1 of the said Act, and was not barred.

SIR MONTAGUE E. SMITH :—This was an action on a security common in *Bengal*, called a mortgage bond, which appears to combine in one instrument two things, a personal obligation by the maker of the bond to pay the money, and a mortgage of property by way of pledge and security. The bond in question is dated the 21st of June, 1856, and was given by *Baboo Ritbhunjun Singh*, who is the Defendant No. 1 in the suit, to *Mussumat Agar Koonwar*. The consideration for the bond consists of the amounts which are stated to have been due under five previous bonds given to the Mussumat by *Baboo Dyal Singh* the father of *Ritbhunjun Singh*. The bond recites the former bonds, and proceeds thus :—"Hence, I, the declarant, do of my own accord and consent make myself responsible for the sums of money covered by each of the five above-named bonds, principal with interest, as well as other loans, &c., in all for Company's rupees 16,511, and bind myself for the payment of the said sum of money to the above said lady." This part of the bond contains a

* *Vide 3, Law Reports, Indian Appeals, 1.*

sonal obligation on the part of the maker of the bond, the Defendant No. 1, to pay the money. Then are inserted the terms of the loan : "With the consent of both parties it has been agreed upon that the interest should be paid as per detail given below, that is, the principal with interest I will pay at the rate of eight annas per cent. from the date of the execution of this bond to the end of Jeyt 1269 F. S., and from 1270 F. S. to Jeyt 1274 F. S. at the rate of Rs. 1 per cent. per mensem. Accordingly, I hereby declare and give in writing that I will positively, without any objection whatever, liquidate the said sum of money, principal with interest, in the month of Jeyt 1274 F. S., to the aforesaid lady." As far, therefore, as we have hitherto gone in the bond, the ultimate period for payment would not accrue until Jeyt 1274. Now comes the part of the instrument which creates an hypothecation of land : "For the satisfaction of the lady, and as security for the above sums of money, I pledge and mortgage mouzahs *Dhumpookhra* and *Bahooara* original, with dependencies appertaining to talooka *Athur*, pergunnah *Bhojepore*, held and possessed by me. I and my heirs shall not, as long as the whole amount aforesaid remains unpaid, transfer them in any way." Then there is a clause to this effect : "Should the mouzahs mortgaged be sold in execution of decree or for arrears of revenue, the said lady shall in that case be at liberty, without waiting for the expiration of the term of payment, to institute a regular suit, and to sell the moveable and immoveable properties of me the declarant and my heirs, and thereby realise the amount in question." This bond was registered on the 23rd of June, 1856.

The action is brought by *Bhedi Singh* and twelve other persons, who are the heirs of the Mussumat, the fourteenth Plaintiff being a person called *Turmundul Dass*, who had purchased a fourth share in the bond. The Defendants in the suit are, first, *Ritbhunjun Singh*, described in the heading of the suit as "the principal contractor of the loan," and, secondly, certain persons who are described in the same heading as "auction purchasers of the pledged property," and it may here be stated that they became such purchasers under a decree obtained upon another mortgage bond made by *Ritbhunjun Singh* subsequently to the bond in question, and of course subject to it. The date of the auction sale which is sought to be impeached is the 18th of May, 1865.

After the discussion which has taken place at the Bar, there remain only two questions to be decided. The first is purely a question of fact which was raised in the following issue, the third issue,—“Whether or

not the mortgagor has received the consideration money?" It has been contended by Mr. *Arathoon* that the consideration stated in the bond is not truly stated. The principal amounts of the five bonds enumerated in the bond in question are not disputed, but it is said that an amount of interest equal to the aggregate amount of the principal sums,—the principal being Rs. 8,000, and the interest Rs. 8,000 also,—found its way into the bond by some fraud or error, and that in point of fact that interest was not due, but had been previously paid. Both Courts below went very fully into the evidence given on that issue, and came to the concurrent finding that the Defendant has failed to establish it. Having executed this bond the onus is upon him to shew that the consideration had not passed. Both Courts have come to the conclusion that he has failed to support that burden, and that he has shewn no sufficient ground for the conclusion that that interest was not due. It is said that calculating only simple interest on the bond, the Rs. 8,000 could not be made up; but the High Court make a suggestion, which their Lordships regard as a reasonable supposition, that the parties before entering into the new bond may have come to an arrangement that rests should be made in the account, and compound interest paid. In the absence of satisfactory proof of fraud or mistake, every presumption in favour of the statements contained in the bond ought to be made, considering that it was deliberately entered into, and that for many years it has been acted upon, and payments made under it. Their Lordships, therefore, see no reason to be dissatisfied with the conclusion to which the Courts below have come upon the issue of fact, and the appeal so far as that issue is concerned fails.

The other question arises upon the period of limitation which is applicable to this case. As already observed, the instrument contains two distinct things: the obligation to pay the money, which binds the maker of it only, and the mortgage of the land; and the plaint in the present suit is properly framed upon the instrument in that aspect. It seeks to charge the first Defendant, the maker of the bond, *Ritbhunjun Singh*, personally, and it also claims to recover the amount of the principal and interest by the sale of the mouzahs (naming them), which were the hypothecated property included in the mortgage. It is contended for the Appellant that the limitation contained in clause 16, section 1, of the Act XIV. of 1859, is the proper limitation to apply to the case. That is a sweeping clause, which provides thus: "to all suits for which no other limitation is hereby expressly provided, a period of

six years from the time the cause of action arose." It is said that this is a suit brought to recover money lent, and the interest on that money, and that it falls within clause 16, because, although clause 10 applies to suits for money lent, it does not apply to them in the cases where the instrument shall have been registered within six months from the date, and this bond, having been so registered, is not within that section, and, not being otherwise provided for, falls within the limitation of six years in clause 16. Their Lordships, however, are clearly of opinion that neither of these clauses is applicable to this suit, which is brought, in substance, for the recovery of immoveable property, or of an interest in immoveable property, and falls therefore within clause 12 of the first section. The object of the suit is to obtain a sale of the land as against the Defendants grouped as Defendants No. 2 and No. 3, who had become purchasers under a subsequent mortgage bond. It is therefore, as against them, a claim founded not upon the contract to pay the money, but upon the hypothecation of the land. Their Lordships would have been disposed so to apply the *Statute of Limitations* if the matter had been *res integra*, but it appears from the cases to which they have been referred by Mr. Cave that there has been a long and almost uniform current of decisions in the two provinces of *Bengal* and *Madras*, giving this construction to the Act. Their Lordships must not be supposed, in coming to this decision, to give any countenance to the argument of Mr. Arathoon that this suit would have been barred if the limitation of six years under clause 16 had been applicable to it. They think, upon the construction of this bond, there would be good reason for holding that the cause of action arose within six years before the commencement of the suit. However, it is sufficient to say that their Lordships think the limitation applicable to the case is that under clause 12, section 1, of the *Limitation Act*.

In the result, their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, and to dismiss this appeal with costs.

CALCUTTA HIGH COURT.

The 10th August, 1875.

PRESENT :

The Hon'ble L. S. Jackson and the Hon'ble W. F. McDonell, *Judges.*HAMIDOODEEN AHMED, *Petitioner.**Code of Criminal Procedure Act X. of 1872, s. 505.—Probabilities—Pleader.*

A pleader purchased a piece of land adjacent to the Court in which he practises and which was occupied by tenants-at-will. He gave notice to the tenants to quit and he also gave a sum of money to a tenant to remove her hut. This was accepted by her but she did not remove. Then she was served with a notice to pay a daily rent at a very high rate. After this it appeared that by some means or other a fire broke out one night in the fallen thatch of a hut close to her and in consequence her house as well as those of others upon the land were burnt down. Next day the pleader went to the spot and told the tenants not to erect new huts. Then upon report made by the Police, the Magistrate took proceedings under section 505 of the Criminal Procedure against the pleader and ordered him to enter into his recognizances in Rs. 1,000 and two sureties in Rs. 500 each, to be of good behaviour for the space of one year. This order was followed up by a recommendation transmitted through the Judge, that the pleader should be struck off the rolls. The High Court condemned the proceedings of the Magistrate as most irregular and unfounded, and considering the evidence and adverting to the probabilities in the case found that the pleader was a man of excellent character, of station, means, education and every thing that is in fact the direct contrary to the sort of person against whom s. 505 is to be applied, that there was no sort of ground for striking him off the rolls and that these proceedings have not left the slightest stain upon his character. The High Court was also strongly of opinion that it should not be satisfied with merely annulling the orders of the Magistrate but that it should also submit the case for the consideration of the Lieutenant-Governor.

JACKSON, J.—The proceedings in the case of the petitioner Hamid-oodeen Ahmed are of an extraordinary character. It is admitted that the petitioner acquired lawfully and duly from one Tameez the rights which Tameez had as tenant over a piece of land in the neighbourhood of the public offices at the sudder station of Mymensing; and that upon a portion of that land stood some huts occupied by one Monee, who is a common prostitute, by other women of the same profession and by some other persons. The petitioner seems to have taken this land for the purpose of turning out these occupants, who were only tenants-at-will, and using it for some purposes connected with the business of practitioners in the Courts; and in furtherance of that intention he gave notice to this Monee and the other occupants to quit. He further gave Monee a sum of Rupees 5 to enable her to remove her house. This money she accepted but did not remove, and she was afterwards served

with notice to pay a daily rent at a very high rate. After this it appears that by some means or other a fire broke out one night in the fallen thatch of a hut close to her, although not immediately contiguous, and that in consequence the house of Monee and other houses upon that piece of ground were burnt down.

Monee was summoned to the police station and questioned in regard to the fire, for the Police appears to have suspected that it was the work of an incendiary. She thereupon said that the petitioner, Hamidooddeen, had put up part of the frame-work of a house close to her, and that he had made various attempts to induce her to remove, and that she believed he had instigated some one to set fire to her house in order to frighten her into going away. Similar suspicions having been expressed by the other women, the Sub-Inspector of Police made a report of the facts and stated his own opinion as coinciding with the suspicions of the females, to his superior, the District Superintendent, who upon that report endorsed the following order: "To Magistrate for orders: The fire of the 16th instant looks very much like the act of an incendiary. I do not think that under the circumstances, Hamid Ali Vakeel, ought to be allowed to occupy the lands to the detriment of those who occupied the lands previous to the fire—H. W. Reily, District Superintendent." So that although there was manifestly no case which the District Superintendent felt himself in a position to investigate, he gratuitously recommended to the Magistrate that the petitioner should be debarred from the exercise of his private rights in regard to the land which he lawfully held. On receipt of that report the Magistrate appears to have summoned the woman Monee, and he took down her statements which amongst other things contained the following words: "Hamidooddeen Moonsee, a pleader, had the bamboo posts of a house commenced to be built some months since on the east of the road, on the south of the house where the fire broke out, and on the west of mine, which was close to it. Hamid has not built this house because we remain there. Tameez, our landlord, has let him the *bheeta* on which he has put these bamboo posts, but Tameez supports us. Hamid has been for some time wanting us to go away, so that he can have the ground on which our houses stand; two months since he first told me to go. A month ago he gave me Rs. 5 to remove my house and threatened to drive me off if I did not go. I had nowhere to go and was afraid to give the Rs. 5 back. Then his servant brought me a written notice to pay Rs. 3 per day rent. The day after the fire he came and told us we

must not put up these houses any more. On account of this we suspect him being the cause of the fire, and are afraid to put up our houses again. In facts two attempts have already been made to burn my house which is nearest his *bheeta*. Three months ago Bhyrub called to me in the early dawn and I found my thatch was on fire. I pulled out the thatch and in it was a partly consumed *tikya* (charcoal fuel) in some jute. The other attempt was made longer ago." It appears in fact, from the evidence of another witness, that the attempt was made two years ago, *i. e.*, considerably before Hamidoodeen purchased or had any interest in the property at all. Upon these statements the Magistrate makes the following order: "Hamidoodeen Moonshee would appear from the above statements to be a dangerous character. Warrant is issued against him under Section 505 of the Criminal Procedure Code for appearance to-morrow: summons on Tameez, Bhyrub, Manoollah Fakeer, witnesses. The women present to attend again." Upon this, Hamidoodeen, before the warrant had issued, seems to have voluntarily appeared before the Magistrate and was examined. His examination was in these words, the charge being that of being a dangerous character. He was asked have you hired, and when, a plot of ground on the north-east of the Government road on the north of this kutcherry house. His answer was—Yes, on the 16th Augran I received a pottah of three cottahs from one Tameez. There were some prostitutes and others living in hired houses on this ground.

Question.—Did you commence to build a house, and if so why did you discontinue.

Answer.—Yes, and left off for want of laborers.

Question.—What steps did you take to get the prostitutes off the ground.

Answer.—I told them to go again and again—two of the women agreed and then asked to be allowed to stop. One would not. So I served her with a notice to pay Rs. 3 daily rent, then she agreed to go and I gave her Rs. 5 to take herself off, then she did not go, so I told her as she asked to remain a little longer to suit her convenience.

Question.—You did not hear that there were three attempts to burn Monee Noti's houses, the last of which succeeded?

Answer.—No. I only heard of the last one.

Question.—Did you go to the place after all these people had been burnt out?

Answer.—Yes, and I found the day after that they had put up tatties to shelter them so I told Karbali they might clear out of the ground and not put up the houses there any more.

Question—Did you know that there was an empty house lying on the north of your frame-work the last ten days or so that the fire began there?

Answer.—Yes—but I doubt if the fire began there I expect Monee Noti burnt it herself. The houses were my property and bought with the land.

Question.—Do you desire to call any evidence to remove the suspicion that lies against your character of having caused this fire?

Answer.—Yes. Tameez from whom I rent the land, Lokenath Mozoomdar, Manoollah Fakir and others.

Monee Noti was further examined and Tameez was also examined. He says this: "I have permanent ryottee holding of the land on which the houses of Monee Noti, Manoollah Fakir and others were burnt down. I have hitherto received rent from them. Eight months since I gave a lease of the land with the houses on it to defendants. Some of the houses are my property; some the property of the occupants themselves, Monee's house was mine. She had no option of removing the house she lived in. All the others are mine. Monee Noti's house was her own; and she could remove it when she pleased. So also Afzan's, her own, and Karbali's. I should estimate the value of the houses that were mine, and therefore defendants, three in all, at Rs. 100 and so on. So that in fact it is clear that the house of Monee stood upon ground to which the defendant was entitled, that she had been repeatedly warned to quit the land having had no right to it and that the defendant petitioner had given her assistance which she had accepted for the purpose of removing her huts from the land. The only further proceedings that are worth mentioning are that the petitioner called and caused to be examined by the Magistrate witnesses of the very highest respectability including the Deputy Magistrate, Syud Mahomed Israil, who is a gentleman of honorable family, as well as Government officer of rank, the Head Clerk of the Collector's office, Baboo Kaly Churn Bose, and named several other persons of equal position and credit and proved most clearly that he was a person of the best character, of excellent position, of professional status and also of a liberal education. With these facts before him the Magistrate records a judgment in which, after setting out the facts, he says: "Having regard to his interest in

the matter and the action of defendant I have to consider whether the suspicions of his being the prime mover in this offence of mischief by fire are grave, and if they are, whether the suspicions in the past and the apprehensions for the future, constitute him an apparently dangerous character from whom security under Section 505, Criminal Procedure Code, should be demanded. As to the legal application of Section 505 of the Criminal Procedure Code, the words run : "When it appears to the Magistrate, from the evidence as to general character adduced before him that any person is a dangerous character, such Magistrate may require security, &c." There will be no question that a person who commits the offence of mischief by fire is a dangerous character. The question is, what is the evidence of general character in such cases as to a person being a dangerous character on which the Magistrate is justified in acting. It seems to me that in such a case as this the only evidence of general character which can be taken is that bearing on, *i. e.*, bringing suspicion or apprehension of the acts which constitute the man to be a dangerous character. The defendant urges that the loss was his, and then he goes into that question, and afterwards says : "the defendant produces evidence of good character, but nothing to remove the suspicion in this set of facts and apprehended acts. The crime of mischief by fire is of lamentably frequent occurrence and is committed without a chance of detection. It is therefore the more necessary when suspicions are strong to take such measures as may be against a repetition of the crime. As defendant Hamidoodeen Ahmed appears to me to be of dangerous character, I order that he enter into his recognizances in Rs. 1,000 and two sureties in Rs. 500 each, to be of good behaviour for the space of one year." This order has been followed up by a recommendation transmitted through the Judge, that the petitioner should be struck off the rolls as a pleader. It appears to me that a more unfounded and irregular proceeding against a person in the petitioner's position could not be conceived. The circumstances which preceded this fire—and it is after all quite an open question whether the fire was the act of an incendiary at all—were such as, if supported by other facts favouring the imputation, might raise a *prima facie* case ; but those circumstances were in truth so completely displaced by the other facts of the case that it appears to me that the issuing of a warrant against the petitioner under such circumstances amounted in my opinion to a cruel wrong. This gentleman was a pleader, and a person of station ; his adversary was a person of the meanest condition. He had the law

in his side, the Courts within his reach; what possible inducement could he have had to expose himself to the risk of a criminal prosecution by connecting himself with such an act as this? While he must have known that if he were supposed to be in any way accessory to the fire, suspicion would immediately, as it did, alight upon him. With knowledge of the behaviour of the natives of this country placed in such circumstances, one may say with tolerable certainty that if this gentleman had been imprudent as well as wicked enough to commit such a crime as this he would certainly have absented himself from the place instead of which we find him the day after the fire repairing to the scene and openly telling the occupants of the houses.—“Now that your houses have been burnt down, you must not erect new houses again, but as I gave you notice take yourself off from this place. They did not attempt them to impute to him the commission of the crime. Then, as to the application of Section 505, it appears to me that the proceedings of the Magistrate in this case are a simple perversion of that section. Section 505 enables the Magistrate, wherever it appears to him, from the evidence as to general character adduced before him, that any person is by repute a robber, housebreaker, or thief, or a receiver of stolen property, knowing the same to have been stolen, or of notoriously bad livelihood, or is a dangerous character, such Magistrate may require security for good behaviour. Now, as to the evidence of general character in this case, it is manifest that it was absolutely and entirely overwhelming in favour of the petitioner, and shows him to be a person of excellent character, of station, means, education and everything that is in fact the direct contrary to the sort of person against whom Section 505 has been directed. In such circumstance as that, to apply the provisions of that section to a man against whom a weak unsupported gossiping charge of mischief by fire has been preferred, appears to be an application of the provisions of the Code of Criminal Procedure as far removed from the intentions of the Legislature as it is possible to conceive. It appears to me that the orders of the Magistrate in this case were not only illegal but oppressive; and I am so strongly of that opinion that I think we ought not to be satisfied with merely annulling his orders, but that we must also submit the case for the consideration of the Lieutenant-Governor.

It is needless perhaps to say that there is no sort of ground for dismissing the petitioner from his office as pleader, and that these proceedings have left not the slightest stain upon his character.



CALCUTTA HIGH COURT.

*The 15th June, 1866.*The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*In re SUEIKH AHMEENOODEEN AHMED,* *Petitioner.**Pleader—Dismissal.*

It is very improper to suspend a pleader for misconduct, and then to leave the matter undecided, whether he is to be dismissed, or the suspension is to be removed for any long period.

Judges ought to reflect upon before they dismiss a pleader on the basis of a charge of misconduct of which he has already been acquitted by a competent Criminal Court.

Pleaders and witnesses who are not parties to a suit, cannot call witnesses on their own behalf to disprove any charge which may be made against them. If a Judge states his reason for disbelieving a witness, whether the Judge be a Judge of the High Court or not, his remarks are not sufficient to justify the conviction and punishment of the witness. Statements made behind a person's back, and which he has no means of answering, are surely not to be used as evidence on which to convict him of a crime, or to dismiss him from practising his profession.

Pleaders are admitted to that honorable profession on proof of their capacity and of their good moral character. Unless it is shown that they are possessed of the requisite capacity and good moral character they cannot be admitted. But when once admitted, unless on proof of specified misconduct, they cannot be removed from that profession.

PEACOCK, C. J.—On the 22nd January last, Mr. Birch, who was the Judge of Shahabad, dismissed the petitioner, Sheikh Ahmeenodeen Ahmed from his office as a pleader of that district. The order was passed after Act XX. of 1865 come into operation. That Act came into operation on the 1st January, 1866, and by the 3rd Section of the Act it is enacted that, “so far as they affect the territories to which the Act extends, the enactments set forth in the first schedule hereto are repealed, except so far as they repeal any other enactment, and except as to the recovery and application of any penalty for any offence which shall have been committed before the commencement of this Act.”

One of the Acts mentioned in the schedule as repealed was Act XVIII. of 1852, called the Pleaders' Act, and it is clear, I think, that the dismissal of a pleader under that Act cannot be considered as the recovery and application of a penalty as provided for in Section 3.

* *Vide 2, Wym. Rep. (Civil Rulings) p. 66.*

Therefore the Judge, when he passed that order, had no power to make it. He ought to have proceeded under the provisions of Section 16, and to have referred the matter, with his report, to the High Court, if he thought that there was ground for dismissing the petitioner.

On the 6th April last, this Court made an order to the effect that the order of the Judge dismissing the petitioner will be quashed, unless the Judge, within one fortnight after the receipt of the order of this Court, shall show cause to the contrary.

On the 14th April, 1866, the Judge sent a letter commencing :—

“I have been called on by the High Court to show cause why my decision of the 22nd January last should not be reversed. My order has been quashed without any reference to the records upon which it was based.

“As this mode of procedure is novel to me, and I do not know what I am required to do, and as I consider that my order is perfectly justified by the records of the cases I now submit, I have only to ask that the Judges will be pleased to go through these cases. I have made my notes on the pleader’s petition, which is full of misrepresentations. More than this I do not consider myself bound to do.”

But then the Judge thinks it right to remonstrate against the order of the Court. He says :—

“I beg respectfully to remonstrate against the procedure adopted in this case. My order has been reserved without the Appellate Court looking at the records on which I had founded my opinion. The pleader has returned, giving out that he is to be allowed to practise at once, I submit that the Judges of the Appellate Court should assume that a Judge has come to a right decision until they are in a position to show from the records upon which the Judge has based his decision, that he is not justified in coming to the conclusion he has arrived at.”

Now this Court did not set aside the order without hearing the Judge. They made their order in the form in which they framed it, rather out of consideration to him ; they did not call upon the Judge to show cause why his order should not be reversed, and they did not reverse his order without giving him an opportunity of supporting it if he wished. They merely say that the order will be quashed if he does not show cause to the contrary. If Mr. Birch had been called upon to show cause (he being a Judge of a subordinate Court), it might have looked as if the Court had decided that he had acted improperly, and called upon him for an explanation.

With regard to the Judge's remonstrance, the Court did not assume the Judge had come to a wrong decision without having looked into the case. His own order upon the face of it showed that he was *prima facie* wrong, and therefore the Court said, in substance, that they would quash it, unless he could show that it was right.

Now, the proceeding against the petitioner commenced as far back as the 22nd July, 1863. He was then called upon to show cause why he should not be dismissed, and he was actually suspended from appearing in the Judge's Court.

The Judge, in his order dismissing the petitioner, says:—"Sheikh Ahmeenooddeen, pleader of the Judge's Court, was *quasi* suspended by my predecessor, in consequence of a number of charges preferred against him of dishonest conduct in the discharges of his professional duty. He was called upon by my predecessor to answer to the charges, and his answers were filed. The case was not, however, taken up by my predecessor, but, though ripe for decision, was left to me to dispose of."

I do not know what the Judge meant by "*quasi* suspended." Probably he meant that the petitioner was not suspended altogether, but only so far as appearing in the Judge's Court. Be that, however, as it may, the pleader was actually suspended, and he had the imputation of dishonesty cast upon him as far back as the 22nd July, 1863, nearly two and a half years ago, and the matter was not finally disposed of, one way or the other, until the 22nd January in the present year. I must say that it appears to me a very improper thing to suspend a pleader for misconduct, and then to leave the matter undecided, whether he is to be dismissed, or the suspension is to be removed for any long period. That, probably, was not Mr. Birch's fault, but the fault of his predecessor, in not taking up the case and deciding it as soon as it was ripe for hearing.

The Judge says:—

"The first charge is that the pleader, in the case of Sokhee Roy, fraudulently applied for a sum of money which his client had realized before the mutiny. The pleader filed an answer, denying that his client had ever received the money. It was proved that he had, and the Principal Sudder Ameen sent the pleader to the Magistrate. The case came before the Joint Magistrate, who, crediting the pleader's statement that he did not know the money had been paid, let him off. The present petitioner urges that conduct such as this should be noticed, although the pleader has been let off by the Criminal Court."

With reference to this charge, the petitioner says :—

“That the first charge is wholly answered by the fact that your petitioner was acquitted by the Magistrate, nor is there any proof that your petitioner applied for that money with a knowledge that his client had previously realized the same. Your petitioner, as a vakeal, received instructions in regard to that matter, and acted on the instructions he had received, and thus your petitioner submits that no intentional misrepresentation has been made out, nor could be.”

Upon this the Judge remarks :—

“Reference has only to be made to the formal decision of the Principal Sudder Ameen, dated 3rd October, 1861, to show the falsity of this statement.”

The Principal Sudder Ameen at that time did not decide that the pleader had been guilty of misconduct. He only found that a *prima facie* case existed against him, upon which he sent the pleader before the Magistrate upon a criminal charge. The mere order of reference to the Magistrate in a case in which the pleader merely acted as a pleader, and was not even a party, cannot be taken as conclusive evidence against the petitioner to justify his dismissal for an offence for which he had been tried and acquitted by the Magistrate. But the case did not stop there. On the 22nd December, 1862, Mr. DaCosta, the Principal Sudder Ameen, passed an order on a petition against the petitioner. Mr. DaCosta went into the case, and found that the pleader had been acquitted by the Magistrate, and he dismissed the petition, and made the petitioner pay costs. How then can anything said by the Principal Sudder Ameen before the case was heard and finally determined by the Magistrate and Mr. DaCosta in favor of the pleader, be taken as evidence of his guilt?

The pleader, then, has been acquitted by the Magistrate, and acquitted by Mr. DaCosta in 1862; and yet, more than three years afterwards, he is convicted by Mr. Birch of an alleged previous offence, merely upon the statement made by the First Principal Sudder Ameen when he sent him before the Magistrate. But Mr. Birch in this letter says :—

“This acquittal of the criminal charge by an inexperienced young officer does not remove the stigma attached to his name by the formal record of his dishonest conduct as a pleader by the Principal Sudder Ameen, and the Judge at the time should have dismissed him, upon the Principal Sudder Ameen’s decision.”

I think that Judges, before they act in this way, ought to reflect upon what they are about. The petitioner had obtained his sunnud twenty years ago, and he ought not to be dismissed unless a case were proved against him. It is ruin to a man to be dismissed from the office of pleader, and deprived of the right of carrying on a profession in which he has been engaged, and been supporting himself and his family for a period of twenty years. But he is not only dismissed, but dismissed with a ruined character. Is a man to be ruined in his character and in his prospects in life upon the charge of having committed an offence of which he has been acquitted, merely because a Principal Sudder Ameen, three or four years ago, made some remarks against him, and charged him with an offence of which he was acquitted by the tribunal which had jurisdiction to try him? Or is he to be dismissed in 1863 for the very same charge for which the Principal Sudder Ameen had dismissed, with costs, a petition against him in 1862? If such a proceeding as this is to be upheld, no man would be safe?

The second charge is that, "being the vakeel of Chowdry Sheo Sahai Singh, who sued for possession in virtue of a mortgage deed, he purchassd the land, the subject of the suit, in another execution of decree case, and threw up his appointment of vakeel to Sheo Sahai Singh, thereby acting dishonestly by his client. Having purchased the land under mortgage to the detriment of his client, he is accused of dishonest and unprofessional conduct."

In reference to this charge, the Judge, in his order of dismissal, remarked as follows:—

"I consider that the pleader's conduct in purchasing in execution in another case a property under litigation, of which litigation he had the management, is of itself a breach of trust sufficient to render him deserving of dismissal. His subsequent reconciliation with his client in no way affects the dishonesty of his conduct."

The pleader, in his answer to this second charge, says that there is no one of the elements for which a dismissal is provided by Act XVIII. of 1852. The purchase of the property in auction jointly with others, which property was alleged to be pledged under a bond upon which a suit had been instituted, is, your petitioner submits, not fraudulent conduct. Your petitioner, upon the purchase, withdrew from the case with notice to his client, who made no objection. If the bond were true, the purchase by your petitioner jointly with others of the rights of the ori-

ginal proprietor would in no way prejudice the plaintiff in that suit. The Judge is wrong, both in law and in fact, in saying that your petitioner's conduct was to the detriment of his client, and that he is accused of dishonest and unprofessional conduct, whereas there is no charge preferred against him by any person."

Now, it is well known that a purchaser at a sale in execution purchases only the rights of the judgment-debtor, and that if he purchases an estate under mortgage, he does not take it free from the mortgage. When the property in question was put up for sale, the petitioner joined other persons in purchasing it. Of course his interest as a purchaser would be in conflict with his duty as a pleader for the mortgagee, who was endeavouring to establish his mortgage. As a pleader, it would be his duty to endeavour to establish the mortgage; as a purchaser, it would be his interest to get rid of the mortgage, so as to acquire the property free from the mortgage. It is unnecessary for the present purpose to determine whether the pleader having been retained by his client for the purpose of establishing the mortgage, could have abandoned his retainer and joined with others in purchasing the property. That is not the charge on which the Judge has dismissed him. He dismissed him for dishonest conduct. Remaking on the pleader's answer to the second charge, the Judge says:—"Reference to the formal decision of the Principal Sudder Ameen, 15th December, 1860, in which he comments with severity on the pleader's dishonesty, will show what an officer of his experience thought of this case, and the pleader ought to have been dismissed, then and there, under Section 2, Act XVIII. of 1852."

But when we look at the decision to which the Judge refers, we find that the Principal Sudder Ameen, having gone into the question as to whether the bond was a genuine document or not, said, "in my opinion, the bond is not a valid document; its very existence is founded on fraud and fiction." Now, the bond is found by this judgment to be a forged bond, and founded on fraud and fiction. The pleader having been retained to enforce the bond, joined others in purchasing the property. But the pleader did not do it secretly. He gave his clients information of his having joined others in purchasing the property as he alleged, and he threw up his retainer with the consent of his client, or at least after notice to the client, and without objection. If the pleader had concealed from his client the fact of his having purchased, or if he had purchased *benamee*, and continued to act for his client as if nothing

had occurred, and allowed his client to lose his case by having his mortgage set aside, there would have been dishonesty. But where was the dishonesty in throwing up the retainer and becoming the purchaser?

The Principal Sudder Ameen proceeds to remark :—"And it is not unlikely that the first party, defendants, too, had a hand in this fraud; because to be indifferent after what had transpired argues complicity in the fraud. It is certainly surprising for Sheikh Ahmeenooddeen Ahmed, pleader of this Court, to act in the manner he has done. Although he was plaintiff's pleader, still he purchased at an auction sale the same property *that was* pledged in the bond; afterwards disengaging himself from pleadership to plaintiffs, appears on the side of the defendant to set aside the bond, and again having entered into a razeenamah with the plaintiff, resumes his pleadership, and while engaged as his pleader, he gave his evidence deposing that he cannot say whether the instalment bond was genuine."

By allowing the pleader to resume his pleadership, it would seem that the client did not think that the pleader had committed an act of dishonesty. The Judge does not find that the pleader purchased without notice to his client, or that his client objected to his throwing up the retainer, nor is it anywhere found that the mortgage was concocted and set up fraudulently by the pleader and his client, in order that the pleader might become the purchaser at a low rate upon the supposition created, that the land sold was subject to the mortgage.

Section 2 of Act XVIII. of 1852 provides :—"Any pleader practising in the said Courts shall be liable to dismissal on proof of his conviction, by a competent Court, of a criminal offence, or on proof of a declaration or finding by a competent Court in a suit or proceeding to which such pleader was a party, that he has knowingly committed a breach of trust, or for fraudulent or dishonest conduct in the discharge of his professional duty."

Surely this was not a suit against the pleader for breach of trust. This was a suit to enforce a mortgage against the purchaser. If the pleader had kept the retainer, his duty as a pleader would have been adverse to his interest as a purchaser. The suit was brought to determine whether the mortgage ought to be enforced against the pleader as purchaser, and it was settled by compromise. The suit was not brought by the owner of the land for depreciating the sale by setting up a fictitious sale. The owner of the land made no complaint. How then can it be said that this was a suit instituted against the pleader in which a Court

of competent jurisdiction decided that he knowingly committed a breach of trust? What breach of trust? Surely not the throwing up of his retainer in a suit to enforce a forged bond? If there was a breach of trust, who was the trustee, and who was the person beneficially interested in the trust?

The third charge against the pleader is, that he filed a petition in the name of Mussamut Padmawat Kooer, which petition he was not authorized to file, and that he filed it with fraudulent intent.

In reference to this charge, the Judge says:—"My predecessor appears to have taken this case up, but to have let it drop on the representation of other pleaders of the Court, that they had to rely upon mookhtears who applied to them to file petitions."

In pronouncing the judgment of the Court in this case, dismissing the pleader, the Judge passed from the second to the fourth charge, thereby letting the third charge drop, as his predecessor had done.

In reference to this charge, the pleader says "that the third charge against your petitioner was one that had been investigated and dismissed; your petitioner should not again be harassed with it. Besides, the Judge is wrong in saying that the matter was dropped by former Judge on the representation of the pleaders. The party who had preferred that charge was called upon to support it by oath, but did not do so, and therefore the Judge dismissed the charge." In commenting on the pleader's answers, the Judge takes up the charge again which he had passed over in his judgment. He says, "the lady petitioned the Court that she had never authorized the pleader to file the petition he had filed on her behalf, and which was injurious to her interests. On this, Mr. Leycester called on the pleader to defend his conduct. (3rd March, 1862). Mr. Tucker then ordered the lady to appear in Court and give her deposition. She of course objected, being a lady of rank, and asked that a commission might issue. This was refused, and the case was struck off *because the lady would not come into Court*. Reference to Mr. Leycester's roobakaree will show what he thought of the pleader's conduct."

In answer to the same charge the pleader goes on further to say, "that your petitioner had put in his defence in that matter, and had completely refuted the charge preferred against him; and, further, there is no evidence whatever in this investigation that your petitioner acted with a guilty knowledge, or was a party to the fraud, if there was any, for the subsequent conduct of Mussamut Padmarwat clearly shows that

she was playing "fast and loose," for she compromised the suit afterwards on the very terms of that petition."

The Judge says that the charge was allowed to drop because a commission was refused and the lady would not come into Court. I thought it very unlikely that Mr. Leycester would have refused to issue a commission, and have compelled a lady of rank to appear in Court. The Judge has not ascertained the facts with accuracy. A commission was not refused; the persons who appeared for the lady were asked if she would declare that she never signed the document. The persons who represented her stated that she was away from home, that she could not appear in Court, but that if a commission were issued they had no doubt she would prove that she had not signed. Three weeks were given to them; at the end of that time they did not appear. But what is very remarkable, the suit was afterwards compromised by the lady on the terms of the petition which the pleader was charged with having filed without her authority. The Judge does not deny that part of the statement of the pleader.

The next charge is the fourth charge, namely, "that the pleader having taken a vakalutnamah to file an objection to a sale, instead of filing it kept it back, let the sale proceed, and purchased the property sold in the name of his wives and defendants, and that in so doing, he was guilty of dishonest conduct in the discharge of his professional duty."

The pleader answers:—

"The fourth charge is wholly unfounded. Your petitioner never took any vakalutnamah to put in an objection to the sale. The very petition of 18th November, 1862, by which the complaint as to the irregularity of sale was made on behalf of the judgment-debtor, places the matter beyond a doubt, that your petitioner refused to receive the vakalutnamah. Those were enough, but your petitioner distinctly denied the fact that he was ever offered that vakalutnamah, and it has never been proved that that vakalutnamah was offered to your petitioner. Further, the person who is said to have acted as Mokhtar was not then a Mokhtar of the Judge's Court, and that is clear from that very petition. Besides, your petitioner was not a vakeel of the Sudder Ameen's Court. The object of that petition is quite clear from its contents, that it was only to create evidence of a purchase for the judgment-debtor himself, and was nothing but a vituperation, as is usual amongst natives.

“ Your petitioner would also submit that there is not a tittle of evidence in support of such charge.”

With reference to the pleader's answer, the Judge merely says, that “ reference must be made to Mr. Solano's petition.” Now it ought to be known that pleaders are not to be ruined in their character and prospects in life on a mere petition without proof. There was no evidence whatever in this case to prove the charge against the petitioner. No man would be safe if every statement made in a petition filed in the Mofussil Courts is assumed to be true without any evidence given in support of it. In this case Mr. Solano himself did not even verify his petition. This charge, therefore, like the others, falls to the ground.

The next is the fifth charge, which is “ that the pleader fraudulently and dishonestly filed a petition on behalf of Mussamut Moula Bux which she had not authorized him to file.” On this charge, the Judge, in his order of dismissal, says:—“ As regards his conduct in the last mentioned case, it has been commented on with severity by the Judges of the High Court in the case of Moula Buksh *versus* Hossein Jan ; the pleader is pronounced to be wanting in strict integrity, and the evidence given by him is pronounced to be utterly unreliable by one of the Judges.”

But it should be borne in mind that the pleader was no party to that suit, and whatever remarks the Judges may have made in that case, as to whether he was worthy of credit or not, the mere remarks made in a suit, *inter alias*, against which the pleader had no means of defending himself. They were probably not even made in his presence. Pleadors and witnesses who are not parties to a suit cannot call witnesses on their own behalf to disprove any charge which may be made against them. If a Judge states his reason for disbelieving a witness, whether the Judge be a Judge of the High Court or not, his remarks are not sufficient to justify the conviction and punishment of the witness.

If a Judge says, I wholly disbelieve the witness, or if he go further, and says, I believe the witness has perjured himself, this is not sufficient to warrant the punishment of the witness for perjury without a trial. Is it no punishment, I would ask, for a man to be dismissed from a profession with degradation ? Statements made behind a person's back, and which he has no means of answering, are surely not to be used as evidence on which to convict him of a crime, or to dismiss him with disgrace from practising his profession. There is only one course to be pur-

sued by Judges in dealing with pleaders guilty of misconduct. They should enter a charge and decide the case according to the evidence. Act XVIII. of 1852, under which the Judge appears to have been erroneously acting, says (Section 2) that a pleader shall be liable to dismissal on proof "of his conviction, by a competent Court, of a criminal offence," or on proof "of a declaration or finding by a competent Court in a suit or proceeding to which such pleader was a party" that he is guilty of a breach of trust.

There has been no proof of a conviction by a Criminal Court of a criminal offence, nor was the decision of the High Court, referred to by the Judge, a decision in a suit in which the pleader was a party. It was a proceeding *inter alias*, and could not be taken as evidence against the pleader, or be used as a ground for dismissing him without giving him an opportunity of defending himself.

The third ground mentioned in the Act to justify the dismissal of a pleader is "fraudulent or dishonest conduct in the discharge of his professional duty." But to justify such a dismissal, it is necessary for the Court to find either from the conduct of the pleader which they themselves witness in Court, or from evidence produced before them, that the pleader is guilty of fraudulent or dishonest conduct; and this also must be done after notice to the pleader, and allowing him to be heard. The observations, therefore, of the High Court in the case referred to did not warrant the Judge in dismissing the pleader.

The Judge goes on (and I must say that I could scarcely have believed that a Judge of Mr. Birch's judgment and experience could have fallen into such an error as he has done.)

"The pleader bears a bad character in the Courts of the Sudder station, and *were I to search for other evidence against him, I am informed that it would be forthcoming.* I consider it unnecessary to do so."

Could anything be more dangerous or unsatisfactory than for a Judge to allow his mind to be influenced by such considerations as these, or could anything be more improper than for one intrusted with a judicial office, on pronouncing a decision which must necessarily ruin a man's character and prospects in life, to declare and to register against him on the records of his Court that "if he were to search for other evidence, he is informed it would be forthcoming?"

It appears to me that the charges against the petitioner are not made out, and that until he is proved to have been guilty of dishonest conduct, he must be presumed to be innocent. A pleader is not to be

dismissed from the practice of his profession merely upon suspicion and and without proof. The Judge says in his letter—"if the Court is not satisfied with the expression of my opinion of the pleader's acts and character, I would suggest that Mr. Tucker and Moulvie Imdad Ali Khan, Small Cause Court Judges of Tirhoot, be called upon for their opinions. I am informed that it was Mr. Tucker's intention to dismiss the pleader."

But pleaders are not to be dismissed merely upon Judges' opinions, nor is one Judge to dismiss a man because he is informed that it was his predecessor's intention to do so. A pleader, like any other man, is entitled to be heard, and to defend himself, like any other person, against any charges against his character or conduct. He is entitled to an open trial, and not to be convicted without proof.

The Judge says further—"his restoration to office will have a bad effect and neutralize my efforts to purify the Courts." But if a pleader has been dismissed illegally he must be restored, and if the Courts are to be purified, they must be purified by lawful means.

Having heard all that the Judge has said in support of the order, I am of opinion that the order cannot be supported, and that it must be quashed.

MR. JUSTICE JACKSON.—I am of the same opinion. As the Judge has taken upon himself to act in this matter, and to dismiss the petitioner from his office of pleader, it must be assumed that he considered himself to be acting, not under the existing law, but under the law in force previous to 1st January last.

Under the repealed Act XVIII. of 1852, there were three causes for which a pleader might be dismissed. One was on account of his conviction by a competent Court of a criminal offence. The second was on account of its being declared or found by a competent Court, in a suit or proceeding to which the pleader was a party, that he has knowingly committed a breach of trust. The third was on account of fraudulent or dishonest conduct in the discharge of his professional duty. The 3rd Section of that Act points out the mode in which either of the two first mentioned causes is to be shown: the first to be shown by the production of an authenticated copy of the judgment containing such conviction; the second, in like manner, to be supported by an authenticated copy of the decision containing such declaration or finding, and in addition to that, the Court is to be satisfied in each case by proof that

such judgment or decision has not been set aside or reversed, and that the pleader is the party to whom such conviction or decision relates.

The third of these causes is to be established by proof to be taken and set up, in the presence of the accused party, before the Judge who enquires into the matter.

In this case there were five charges against the petitioner, and alluded to in the course of the proceedings. The first, it may be supposed, the Judge considered as coming under the first category, namely, criminal charge. But although the person was charged with a criminal offence and made over to the Magistrate, so far from being convicted, I find that he was acquitted, and that the judgment of the civil authority referring him to the Magistrate was afterwards virtually set aside by another Principal Sudder Ameen in the same district.

Then as to any finding in a suit or proceeding to which the pleader was a party that he had knowingly committed a breach of trust, certainly there is nothing of that kind. There are two cases here. The 2nd and 5th instances, the Judge seems to consider, may have come within that category. But certainly there were no suits or proceedings to which he was a party, or any decision of a Court of competent jurisdiction that the petitioner had committed a breach of trust, nor was there any compliance with the procedure prescribed by Section 4, by which he could have been properly convicted. Section 4 says :—

“When any pleader is charged with fraudulent or dishonest conduct in the discharge of his professional duty by any person or Court, the Court competent to make an order for his dismissal shall serve, or cause to be served, upon such a pleader a copy of the charge or charges brought against him, and also a notice of the day appointed by the said Court for the hearing of such charge or charges; and such copy and notice shall be served upon the said pleader at least twenty clear days before the day appointed for such hearing, and on the hearing of the said charge or charges, the Court shall receive all such relevant evidence as shall be properly tendered by or on behalf of the Court or party bringing the charge or charges, or by the said pleader, and shall proceed to adjudicate on the said charge or charges in a summary way, and shall record its decision and the reasons on which the same is grounded.”

Can it be said that there was any such adjudication as this—that the party was called upon to answer any charges brought against him, that any evidence was tendered to, and received by, the Judge? He has done nothing of the kind. He has acted on opinions contained in a

mass of papers, upon charges made long before, some disproved, some dropped, and some not amounting to misconduct at all, such as to warrant a dismissal.

It is a privilege of vakeels, and I think it is very much to the interest, of the public at large that they should have that privilege. They are admitted to that honorable profession on proof of their capacity and of their good moral character. Unless it is shown that they are possessed of the requisite capacity and good moral character they cannot be admitted. But when once admitted, unless on proof of specified misconduct, they cannot be removed from that profession.

It appears to me that there has been no such proof on this occasion; and that no ground existed under Act XVIII. of 1852 for the removal of the petitioner.

Therefore I entirely agree in the judgment of the Chief Justice, and in quashing the order passed by the Judge of Shahabad.

The 23rd November, 1875.

PRESENT :

Mr. Justice Jackson and Mr. Justice McDonell.

MATUNGEE CHURN MITTER* (*Plaintiff*)

versus

MOORRARRY MOHUN GHOSE and others (*Defendants*.)

Putni Tenure, Sale of, for Arrears of Rent—Regulation VIII. of 1819, s. 8, cl. 2, and s. 14—Date of Publication of Notice.

The fact that the receipt of the notice of sale was dated the 15th of Bysack, and therefore did not show that the notice had been published at some time "previous to that day," so as to satisfy the provisions of s. 8, cl. 2 of Reg. VIII. of 1819, was held not to be sufficient ground for setting aside the sale of a putni tenure for arrears of rent. There being nothing in the receipt to show the date on which the notice was published, no injury to the plaintiff having been proved, and it appearing that more than the time prescribed by the Regulation had elapsed before the sale actually took place, the Court refused to set aside the sale.

It would not be a "sufficient plea" within the meaning of s. 14 that the receipt had been obtained, or the notification published, on, instead of previous to, the 15th of Bysack.

JACKSON, J.—In this case, the suit was brought for the purpose of setting aside the sale of 12-anna share of a putni tenure held by the defaulter. A great number of objections, some of a frivolous kind, and some of an unjustifiable kind, have been brought forward in appeal, but the only one which deserves notice or which was seriously pressed is that where it is contended that the notice in this case does not appear to have been published before the 15th Bysack, the sale having taken place on the 3rd Joisto following. Now, it is to be observed that the Legislature, in passing Regulation VIII. of 1819, for just and equitable purposes, prescribed a variety of forms required to be gone through by zemindars, on applying for the sale of a putni tenure for arrears accrued due thereon, some part of the procedure being carried out by officers of the Collector's establishment: and one of the matters prescribed by s. 8, cl. 2, is that the Collector should be satisfied of the service of the notice, either by the receipt of the defaulter, or of his manager; or, if that cannot be procured, then by the signature of three substantial persons residing in the neighbourhood. Then it says:—"If it shall appear from the tenor of the receipt or attestation in question, that a

notice has been published at any time previous to the 15th of the month of Bysack, it shall be a sufficient warrant for the sale to proceed upon the day appointed." That and other rules having been so laid down, s. 14 of the same Regulation says:—"It shall be competent to any party desirous of contesting the right of the zemindar to make the sale, whether on the ground of there having been no balance due, or on any other ground, to sue the zemindar for the reversal of the same, and upon establishing a sufficient plea to obtain a decree with full costs and damages." The meaning of that provision, as it appears to me, is, that, if the defaulter or the alleged defaulter should be able to make out that the zemindar was not in a condition to obtain the sale of his under-tenure, that there had been no balance due, or that the procedure enjoined by the Regulation had been neglected, so that the defaulter has been prejudiced by reason of that neglect, then the Civil Court is declared entitled to set aside the sale and to grant a decree to the plaintiff with full costs and damages. But it certainly would be no "sufficient plea" or substantial cause of complaint that the receipt in question had been obtained, or that the notification had been published on, instead of previous to the 15th of the month of Bysack. The law says that if it shall appear, that is, appear to the Collector, that the notice has been published at any time previous to the 15th of the month of Bysack, that shall be a sufficient warrant for the sale to proceed. Now, in the receipt which has been read to us in this case, the particular time of publication is not stated. The receipt is dated the 15th, and has the signatures of three substantial persons which is to be accepted only in case of inability to procure the receipt of the defaulter. It might very well be that the previous day or days had been spent in vain efforts to procure the signatures of the putnidar or his agent, and that the receipt was afterwards completed by the signatures of the munduls, obtained on the 15th of Bysack, and this might well have satisfied the Collector that the notice had been in fact published previous to the 15th. That being so, and no injury to the plaintiff being at all made out, it appears to me that the ground set up is wholly insufficient to induce this Court to set aside the sale. It may be added as it appears in this particular case that the sale, instead of taking place on the 1st of Joisto, did not take place until the 3rd, and therefore even if we assume that the publication had taken place on the 15th, still the defaulter had two days more than is prescribed by the Regulation.

The appeal is dismissed with costs.

HIGH COURT, N. W. P.

The 15th December, 1875.

Mr. Justice Pearson and Mr. Justice Turner.

CHUNNI* (*Defendant*) vs. THAKUR DAS and others (*Plaintiffs*).*Mortgage—Condition against Alienation—Auction-purchaser.*

A transfer of mortgaged property made in contravention of a condition not to alienate is not absolutely void, but voidable in so far as it is in defeazance of the mortgagee's rights.

Where, in contravention of a condition not to alienate, the mortgagor had transferred his proprietary right in the mortgaged property to a third person for a term of years, the Court declared that such transfer should not be binding on a purchaser at the sale in execution of the decree obtained by the mortgagee for the sale of the property in satisfaction of the mortgage-debt, unless such purchaser desired its continuance.

Certain property was mortgaged to the plaintiffs with a stipulation that it will not be transferred to any one until the principal with interest was repaid. A lease for a term of 11 years was, however, granted by the mortgagor.

The judgment of the High Court was as follows :—

The lease is not a lease merely for agricultural purposes, but a transfer of the interest of the proprietor for a term of years. Is it a violation of the condition against alienation? It has been held that such conditions are introduced to protect the lien created by the mortgage, and that a transfer made in contravention of the condition is not absolutely void, but voidable so far as it is in defeazance of the mortgagee's rights. In the present case the mortgagees have obtained a decree for the sale of the estate in satisfaction of the loan. The existence of the lease may induce purchasers to offer a less price for the property than they would offer if they could obtain immediate possession. On the other hand, the lease may be an arrangement highly beneficial to the owner of the estate and thus a substantial increment to its value. The mortgagees will have obtained all that in equity they are entitled to, if the Court gives them a declaration that the lease will not be binding on a purchaser in execution of the decree, unless he desires its continuance. The decrees of the Courts below will be modified accordingly, but as the appeal substantially fails, we must order the appellant to bear the respondents' costs.

* *Vide* 1, Indian Law Reports, Allahabad Series, p. 123.

HIGH COURT, N. W. P.

The 14th January, 1876.

Before Mr. Justice Oldfield.

QUEEN vs. KULTARAN SINGH.

Act X. of 1872, ss. 471 and 472—Offence against Public Justice.

An offence against public justice is not an offence in contempt of Court within the meaning of s. 473, Act X. of 1872.

But notwithstanding this the Court, Civil or Criminal, which is of opinion that there is sufficient ground for inquiring into a charge mentioned in ss. 467, 468, 469, Act X. of 1872, may not, except as is provided in s. 472, try the accused person itself for the offence charged.

The case of *Sufatoolah*, 22, W. R. Cr., 40, followed (See 10, Bom. H. C. Rep., p. 73; and 7, Mad. H. C. Reports, Rulings xvii. and xviii.)

An Assistant Collector trying a rent suit was of opinion that the defendant Kultaran Singh was guilty of an offence under s. 196 of the Penal Code (for using evidence known to be false), and his witness Bhi-kam Singh of one under s. 193, (for giving false evidence). That officer, therefore, acting in the capacity of Assistant Magistrate, proceeded to try the accused and sentenced each to one year's rigorous imprisonment.

The High Court called for the record of the case on the petition of Kultaran Singh.

OLDFIELD, J.—(In delivering judgment said)—But it appears to me that, with reference to s. 471, the Assistant Magistrate was not competent to try the petitioner for an offence under s. 196, committed before him as Assistant Collector. S. 471 is as follows:—"When any Court, Civil or Criminal, is of opinion that there is sufficient ground for inquiring into any charge mentioned in ss. 467, 468, 469, such Court, after making such preliminary inquiry as may be necessary, may either commit the case itself or may send the case for inquiry to any Magistrate having power to try or commit for trial the accused person for the offence charged."

This section seems to require that the Court shall either commit the case or send it to some other Magistrate, but not charge or try the person on its own charge. It appears to have been intended that the rule in s. 471 should have general application, with the one exception provided for in s. 472. That section gives an exceptional power to a Court of Session to charge and try on its own charge a person for an

* *Videli*, Indian Law Reports, Allahabad Series, p. 129.

offence committed before it when the offence is triable by the Court of Session exclusively; and s. 472, by thus exceptionally exempting a Court of Session from the operation of the provisions of s. 471, shows what the general effect and aim of those provisions was intended to be.

To permit the Court in the present case to charge and try for the offence committed before it would be interpreting s. 471 as giving the Court a higher power than is allowed to a Sessions Court. A similar view of the effect of s. 471 was taken by the Calcutta High Court in *Sufatoolah*.

The convictions and sentences passed on Bhilam Singh and Kularan Singh are annulled, and the Court is directed either to commit them for trial or to send the case to another competent Magistrate for disposal.

SHORT NOTES.

PRIVY COUNCIL.

Family Custom—Primogeniture—Mitakshara Law—Joint and Separate Property—Impartibility.

Although an estate be not what is technically known in the north of India as a *raj*, or what is known in the south of India as a *polliam*, the succession thereto may, under a *kabachar*, or family custom, be governed by the rule of primogeniture.

Where the family to which ancestral property held in this peculiar manner belongs is subject to the Mitakshara law, and the property is not separate, the succession, in the event of a holder dying without male issue, is given to the next collateral male heir in preference to the widow or daughters of the deceased holder.

That an estate is *impartible* does not imply that it is separate, and so to be governed by the law applicable to separate succession.

Whether the general status of a Hindu family be joint or divided, property which is joint will follow one, and property which is separate will follow another, course of succession.

Since in documents between Hindus and in the Mitakshara itself it is not unusual to find the leading members of a class alone mentioned when it is intended to comprehend the whole class, a written statement of a family custom, whereby an impartible estate passes in the event of

the holder dying without issue to *his younger brother or his eldest son*, need not be construed as limiting the collateral succession to the two cases named, but as providing generally that on failure of the direct male line, the nearest male heir in the collateral line shall succeed.

Vide I, Indian Law Reports, Calcutta Series, p. 153 (Appeal from Calcutta High Court). The 30th June and 1st July 1875—Chintaman Singh *vs* Nowlukho Konwari.

CALCUTTA HIGH COURT.

Superintendence of High Court in cases not appealable.

Under s. 15 of 24 and 25 Vict., c. 104, the High Court will not interfere with the decisions of the Courts below in cases in which a special appeal is forbidden by s. 27 of Act XXIII. of 1861, and where there is no question of jurisdiction involved. (As to the cases in which the High Court will interfere under the powers conferred by s. 15 of the High Courts' Act, see note to *Tej Ram vs. Harsukh*, I. L. R., 1, All.)

Vide I, Indian Law Reports, Calcutta Series, p. 180. (Sir Richard Garth, Kt., C. J., and Birch, J.) The 17th September 1875—Lukhykant Bose, *Petitioner*.

Inspection of Documents—Rules of High Court of the 6th June 1874, 50, 52, (*Original Civil*.)

* Where the defendant stated in an affidavit, that a schedule annexed thereto contained a list of all the documents in his possession or power relating to the suit, and a certain other document was not mentioned in the schedule, though referred to by the defendant in his written statement, *held* on the hearing of a summons to consider the sufficiency of the affidavit that the plaintiff could not cross-examine on the affidavit but could only show it was not an honest affidavit. The proper course was to apply for inspection of the particular document referred to in the written statement and omitted from the schedule, if inspection was needed.

Vide I, Indian Law Reports, Calcutta Series, p. 178. (Phear, J.) The 14th February 1876—Kennelly *vs* Wyman.

Court Fees Act (VII. of 1870), Sch. I., c/s. 11 & 12—Probate Duty, Exemption from—Interest in Partnership Property.

The testator, a member of the firms of *G. A. & Co.*, of Calcutta, and *O. G. & Co.*, of Liverpool, died in England, leaving a will, of which he appointed *G* in England and *O* in Calcutta his executors. As a

partner in the Calcutta firm, the testator was entitled to a share in an indigo concern and in certain immoveable property in Calcutta, and his share in these properties was, on his death, estimated, and the money-value thereof paid to his estate by the firm in Liverpool, and probate duty had been paid thereon by G in obtaining probate of the will in England. Shortly after the testator's death, the indigo concern was contracted to be sold, and the testator's name appearing on the title-deeds as one of the owners, O applied for probate of the will, to enable him to join in the conveyance and in any future sale of the other immoveable property. An unlimited grant of probate was made to O, who claimed exemption from probate duty in respect of the properties, on the grounds that duty had already been paid in England on the testator's share in them, and that there was no amount or value in respect of which probate was to be granted in India. *Held* on a case referred by the taxing officer, that O was not entitled, in obtaining probate, to exemption from the probate duty payable under Sch. I, cl. 12 of the Court Fees Act, in respect of the properties.

Vide 1, Indian Law Reports, Calcutta Series, p. 168. (Sir R. Garth, Kt., C. J. and Pontifex, J.) The 1st March, 1876—In the Goods of Gladstone (Deceased)

BOMBAY HIGH COURT.

Miras—Razinamah—Extinction of Miras right.

B, a Mirasdar, addressed a *razinama* to the Mamlatdar, resigning certain *miras* lands in favour of L (to whom at the same time he delivered possession of the lands), and containing no reservation or qualification: *Held* that the transfer to L was complete and the rights of B wholly extinguished.

Vide 1, Indian Law Reports, Bombay Series, p. 91. (West and Nanabhai Haridas, J.J.) The 22nd December, 1875 Tarachand Pitchand vs. Lakshman Bhavani.

Undivided Hindu Family—Ancestral estate—Execution—Sale of a coparcener's interest—Tenancy in common—Partition.

In a suit by a member of an undivided Hindu family to have his right declared to a portion of the joint estate which had been sold by the Civil Court in execution of a decree against his coparcener alone.

Held, that the plaintiff should have a decree declaring that he was entitled to joint possession along with the execution purchaser as to

nant in common. But that if a division in *specie* were desired, a suit should be brought for that purpose.

Vide 1, Indian Law Reports, Bombay Series, p. 95. (West and Nanubhai Haridas, J.J.) The 1st February, 1876 Babaji Lakshman and another *vs.* Vasudev Vinayak.

HIGH COURT, N. W. P.

Lambardar—Co-sharer—Profits—Revenue—Set-off.

Held (SPANKIE, J. dissenting), that a lambardar, who had paid an arrear of Government revenue out of the collections of subsequent years without reference to the co-sharer, was entitled, in a suit against him by a co-sharer for his share of the profits for such subsequent years, to claim in the suit a deduction on account of such payment.

Vide 1, Indian Law Reports, Allahabad Series, p. 135. (Full Bench)—The 25th February, 1876—Uda Singh *vs.* Jagannath.

Pre-emption—Conditional Decree—"Final" Judgment and Decree.

The Court granting a decree to the plaintiff in a pre-emption suit is competent to grant the decree subject to the payment of the purchase-money within a fixed period, and if the decree holder fails to comply with the condition imposed on him by the decree, he loses the benefit of the decree.

When a direction contained in a decree referred to the time at which such decree should become *final*, *held* (the case being one in which a special appeal lay) that such decree does not become final on being affirmed by the lower appellate Court, but on the expiry of the period of special appeal, or, where such an appeal was instituted, when the decision of the lower appellate Court was affirmed by the High Court.

(See 10, W. R. p. 53, and H. C. R., N. W. P., 1868, p. 254)

Vide 1, Indian Law Reports, Allahabad Series, p. 132. (Spankie and Oldfield, J.J.) The 11th February, 1876. Shaikh Ewaz, *vs.* Mokuna Bibi.

CALCUTTA HIGH COURT.

The 8th April, 1875.

PRESENT :

Mr. Justice Macpherson, *Offg. Chief Justice*, and Mr. Justice Birch.ROY MEGHIRAJ* (Defendant) *Appellant*,*versus*BEFJOY GORIND BURRAL and others (Plaintiffs) *Respondents*.*Review of Judgment—Act VIII. of 1859, ss. 376, 378—Power of Judge to review Judgment of his Predecessor.*

A Judge has no power to allow a review of his predecessor's judgment on the ground that he comes to a different conclusion on the facts of the case. The general words used in ss. 376 and 378 of Act VIII. of 1859, are controlled and restricted by the particular words, and it is only the discovery of new evidence, or the correction of a patent and indubitable error or omission, or some other particular ground of the like description, which justifies the granting of a review.

MACPHERSON, J.—In this case it appears that upon the 15th of September 1873, Baboo Nuffer Chunder Bhutt, the Offg. Additional Subordinate Judge of Moorshedabad, sitting as a Court of Appeal reversed the decision of the Moonsiff of Jungipore. On the 30th of May and 1st of June 1874, Baboo Nuffer Chunder Bhutt having ceased to hold the office of Additional Subordinate Judge of Moorshedabad, Baboo Nobo Kumar Banerjea, the Second Subordinate Judge of that district, admitted a review of the judgment of Baboo Nuffer Chunder Bhutt, and, reversing his decision, restored and confirmed the decree of the Moonsiff of Jungipore. It is objected in special appeal that Baboo Nobo Kumar Banerjea had no power to review the judgment of Baboo Nuffer Chunder Bhutt; that no sufficient reason was shown for his reviewing it; and that his proceedings ought to be set aside. For the respondent it is contended that whether the review was rightly or wrongly admitted, the matter is not one which can be questioned in special appeal.

It appears from the judgment of Baboo Nobo Kumar Banerjea that he admitted the review, not upon the ground of the discovery of any new matter or evidence which was not within the knowledge of the party applying for review at the time of the original hearing, nor in order to correct any patent error or omission, nor for any other particular defect in the judgment of Baboo Nuffer Chunder Bhutt. He granted the review upon the general ground, that having gone into the case in all its details, he came to a conclusion on the facts different from that at which Baboo Nuffer Chunder Bhutt had arrived.

* *Vide* 1, Indian Law Reports, Calcutta Series, p. 197.

There is no doubt that it is an eminently unsatisfactory and inconvenient state of things, if one Judge succeeding to the office of another, is at liberty to review and rehear all the cases decided by his predecessor, and to dispose of them afresh according to the view which he may happen to take of each. It would be almost equally inconvenient that a Judge should be bound, or should be permitted, perpetually to rehear the cases which he has himself decided, upon every occasion that a party, who is dissatisfied with a decision which has been passed, chooses to ask him to go again through the evidence upon which he has already decided.

But the law, though providing for a review of judgment in certain special cases, does not, under color of a review, authorize rehearing for the purpose merely of seeing whether the Judge, on going again through the case, will arrive at a different conclusion. When a case is reheard, the Court goes through the evidence, and decides afresh upon it. But a review can be given only for certain particular reasons: and it cannot be given merely for the purpose of allowing the parties to reargue the case upon the evidence upon the chance of eventually throwing doubt on the soundness of the decision already passed. As Sir Barnes Peacock says, in the course of his judgment in the Full Bench case of *Nassiruddeen Khan* "I have on more than one occasion observed that an attempt was made to obtain a review of judgment upon the ground that, upon the first hearing, the Court had determined the facts contrary to the weight of evidence. This is matter for appeal, not for a review."

The sections of the Civil Procedure Code which deal with this subject are no doubt very loosely framed. Under s. 376, the ground upon which a review may be granted is stated to be the discovery of new matter or evidence which was not within the knowledge of the party applying for the review, or which could not be adduced by him at the time when such decree was passed, or any other good and sufficient reason. In s. 378, the grounds indicated are the correction of an evident error or omission, or its being otherwise requisite for the ends of justice. These sections show that the intention of the Legislature was that a review should be granted only on the discovery of new evidence or for the correction of some patent error or omission, or for some such cause. For example, if a deed is dated a hundred years ago, and the Judge, accidentally misreading it, thinks it is dated only twenty years ago, and decides the case accordingly; or if the Judge erroneously sup-

poses that the witnesses all stated that the plaintiff lived at A and decides the case accordingly, whereas the witnesses all stated that he lived at Z and not at A,—in such cases, and in any other in which there has been a clear and evident slip or error on the part of the Judge, a review may rightly be admitted. In short, the object of a review is, either to admit new evidence, or to enable the Judge to rectify any patent error, whether of fact or of law, into which he finds he has fallen.

Ss. 376 and 378 give no authority to a Judge, on an application for a review, to rehear the whole case upon the evidence, merely because one of the parties is dissatisfied with his original decision. It is true that in s. 376 there is a general provision that review may be applied for by any one who, from the discovery of new evidence “or from any other good and sufficient reason, may be desirous of obtaining a ‘review,’” and that s. 378 says, a review may be granted if it is necessary to correct an evident error or omission or is otherwise requisite for the ends of justice.” But it is a well-known rule, that in interpreting Acts of the Legislature, general words are controlled and restricted by particular words. And we are of opinion that the general words used in these two sections are controlled and restricted by the particular words; and that it is only the discovery of new evidence or the correction of an evident (*i. e.*, patent and indubitable) error or omission, or some other particular ground of the like description which justifies the granting a review. In the present case, none of the grounds specified, existed, nor did any ground of the like description.

But it is contended that by s. 378 the order, whether for granting or rejecting an application for review, is final. This question, however, has practically been disposed of by the recent decision of a Full Bench in the case of *Bhyrui Chunder Surma Chowdry* (1). The Court there held that the parties in a special appeal are entitled to show that there has been an error or defect in procedure in the granting of the review, which has affected the decision of the case on the merits, by producing a different decision from that which has in the first instance been come to. As in that case it appeared to the learned Judges that no ground had been shown on which a review could legally be granted, so we are of opinion that in this case no ground is shown upon which a review could legally be granted.

* * * * *

(1) 11, B. L. R., 423.

HIGH COURT, N. W. P.

The 13th March, 1876.

PRESENT :

Mr. Justice Spankie and Mr. Justice Oldfield.

HOSSAINI BIBI * (Defendant) *Appellant*,*versus*MOHSIN KHAN (Plaintiff) *Respondent*.*Act VIII. of 1859, s. 327—Arbitration—Award—Appeal.*

The plaintiff sought to file and to enforce a private award, under the provisions of s. 327, Act VIII. of 1859. The defendant objected that he was no party to the award. The Court to which the plaintiff's application was made, after enquiry into the matter, over ruled the objection, and directed that the award should be filed, but made no decree enforcing the award under the provisions of Chapter VI. of Act VIII. of 1859. *Held*, that the order was not open to appeal as it did not operate as a decree.

Per Spankie, J.—S. 327 intended to provide for those cases only in which the reference to arbitration is admitted and an award has been made; where the defendant denies referring any dispute to arbitration or that an award has been made between himself and the plaintiff, sufficient cause is shown why the award should not be filed. The plaintiff should be left to bring a regular suit for the enforcement of the award.

SPANKIE, J.—The prayer of the plaintiff in this case was to be allowed to file a private award of arbitrators in Court, and for the enforcement of the award. The defendant (since deceased) denied that he had authorised his agent to refer any matter to arbitration, and repudiated the whole transaction. The Munsiff after going into the merits admitted the award in the following terms:—"I therefore decree the plaintiff's claim to file the arbitration award under s. 327, Civil Procedure Code, with costs and interest at 6 per cent., to be paid by the answering defendant (the widow of the original defendant, deceased)." It does not appear that he made any decree enforcing the award under the provisions of Ch. vi. of the Act.

The defendant appealed. The Subordinate Judge treating the order as a judgment under s. 325 of Act VIII. of 1859 held that it was final, and that there was no appeal. The Subordinate Judge cites as his authority the Full Bench decision of this Court in the case of *Jokhun Rai** and others, appellants.

It is contended in special appeal that, as it was urged in both the

* *Vide* 1, Indian Law Reports, Allahabad Series, p. 156.

* H. C. R., N. W. P., 1868, p. 358.

lower Courts that the original defendant was no party to the award, the Subordinate Judge was bound to determine whether this was so or not.

For respondents the Full Bench ruling of this Court† and other precedents of the Presidency Court are cited as ruling that there was no appeal.

I am of opinion that we are bound by the decision of the Full Bench of this Court,† and that we must hold that there is no appeal from the order of the Munsiff allowing an award to be filed. At the same time it appears to me that s. 327 intended to provide for those cases only in which a reference to arbitration is admitted, and in which an award has been made. Where one of the parties denies that he had referred any dispute to arbitration, or that an award had been made between himself and the other party, it seems to me that sufficient cause has been shown why the award should not be filed. The applicant for its admission should be left to bring a regular suit for the enforcement of the award. Such, I may add, would appear to be the opinion of the dissenting Judge in one case decided by the Full Bench of the Presidency Court on the 23rd May, 1871.‡ But the Full Bench judgment of this Court must I think be followed by us as being applicable to this case, and I would therefore dismiss this appeal with costs.

OLDFIELD, J.—I concur in dismissing the appeal with costs. I think we are bound by the Full Bench ruling of this Court, and must hold that the order of the Munsiff under s. 327, Act VIII. of 1859, for filing the award does not operate as a decree and is not appealable.

BOMBAY HIGH COURT.

The 16th February, 1876.

PRESENT :

Mr. Justice Westropp, *Chief Justice*, Mr. Justice West and Mr. Justice Nanabhai Haridas, J.J.

GUMNA DAMBERSHET§ (Plaintiff) *Appellant*,

versus

BHIKU HARIBA and another (Defendants) *Respondents*.

Limitation—Promissory Note payable by instalments—Waiver of default.

A promissory Note, dated 2nd April 1868, stipulated that the principal amount with interest was to be repaid by half-yearly instalments of Rs. 150 each, and that, in the event

† H. C. R., N. W. P., 1868, p. 353.

‡ 8, B. L. R., 315 ; S. C., 15, W. R., F. B., 9.

§ Vide 1, Indian Law Reports, Bombay Series, p. 125.

of any one of these instalments not being punctually paid, the whole amount was to become payable at once. Default was made in payment of the first instalment, which fell due on the 2nd October 1868. In an action brought on the 19th October 1871 for the recovery of the whole amount,

Held that the right to bring the suit under Act XIV. of 1859, Section 1, Clause 10, accrued to the plaintiff on the 2nd October 1868, and that, having omitted to bring it for more than three years, he was too late in instituting it on the 19th October 1871.

Held, also, that the plaintiff's right to the immediate payment of the whole amount was not, under the note, subject to be defeated by any subsequent payment, and that no such subsequent payment (assuming it to have been made) could, in the absence of any fresh agreement, supersede or suspend such right.

The proposition laid down in *Ramakrishna Mahadev vs Bayagi Santagi* (5, Bom. H. C. Rep., 35 A. C. J.) "that, although the instalments were not paid by the defendants at the times fixed for payment, yet the defendants having paid the money on account of them, and the plaintiff having accepted it, the payments must be considered, as regards both parties, as if made at the times fixed; and the plaintiff cannot take advantage of the stipulation that the sum should become due on failure to pay any instalment, or the defendants rely upon it as making the whole debt due and fixing the period from which the time of limitation ran", over-ruled, as there is nothing in Act XIV. of 1859, to give any such effect to an acceptance of part payment after the whole debt has become due.

NANABHAI HARIDAS, J.—This is a suit upon a promissory note dated the 2nd April 1868. The note, among other things, stipulates that the principal amount, with interest at 12 per cent. per annum, is to be repaid by half-yearly instalments of Rs 150 each, and that, in the event of any one of those instalments not being punctually paid, the whole amount is to become payable at once.

The first instalment accordingly fell due on the 2nd October 1868, when it was not paid, and this suit was instituted on the 19th October 1871. The Subordinate Judge and the District Judge in appeal have both held it barred by the law of limitation; and the only question, therefore, which we have to determine now is, is it so barred?

The law of limitation applicable to this case is Act XIV. of 1859, of which Clause X, Section 1, provides as follows:—

"To suits brought to recover money lent or interest, or for the breach of any contract in which there is a written engagement or contract, and in which such engagement or contract could have been registered by virtue of any law or regulation in force at the time and place of the execution thereof, the period of three years from the time when the debt became due, or when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered (within six months from the date thereof)."^{*}

^{*} The words within brackets were altered by Act XX. of 1866, Section 27, to "within the time prescribed in that behalf by the Indian Registration Act, 1866."

The promissory note in this case is "a written engagement or contract" within the meaning of that clause, which "could have been registered" under Act XX. of 1866, Section 18, "at the time and place of the execution thereof," but was not. The period of limitation, therefore, within which a suit may be brought upon it is "three years from the time when the debt became due." We are thus brought to the question, when did the debt for which this suit is brought, become due?

The defendants, (*inter alia*,) contend that, upon their failure to pay the first instalment on the 2nd October 1868, the whole money became payable at once under the express stipulation to that effect in the promissory note, and that, therefore, this suit, which was not brought till the 19th October 1871, is barred.

The plaintiff, on the other hand, contends that, notwithstanding the defendants' failure to pay the first instalment at the time it fell due—namely, on the 2nd October 1868—he waived his right to exact payment of the whole amount by subsequently accepting payment of that instalment; that, therefore, until a second default was made in the payment of the next instalment six months after, no right would accrue to him to demand any payment; and that this suit, which is within three years from such second default, is consequently not barred.

Neither the Subordinate Judge nor the District Judge has found whether the plaintiff's allegation as to the subsequent payment to him of the amount of the first instalment by the defendants is proved; and if we thought such payment could make any difference, it would be necessary to have that expressly found by the Courts below. But it seems to us to be immaterial. The note sued on, as already stated, distinctly stipulates that, on failure to pay any one instalment, the whole amount shall at once become due. That contingency having happened on the 2nd October 1868, the plaintiff became entitled to the whole of the money at once*. He might, accordingly, have sued for the whole amount any day after that date. His right to immediate payment thereof was not, under the note itself, subject to be defeated by any subsequent payment, nor was it superseded or suspended by any fresh agreement between the parties; and we do not see how, under the circumstances, any such payment, by the defendants, of part of that for which they had already become liable could, in the absence of any fresh agreement, supersede or suspend such right. There is not any fresh agreement alleged here. The suit is brought on the note itself.

* 7, W. R., p. 21; 7, Bom. H. C. Rep., 125; 11, Idem, 155; 1, Mad H. C. Rep., 209.

In *Ramkrishna vs. Bayagi** it was, no doubt, held by a Division Bench of this Court, consisting of Couch, C. J., and Newton, J., "that, although the instalments were not paid by the defendants at the times fixed for payment, yet the defendants having paid the money on account of them, and the plaintiff having accepted it, the payments must be considered, as regards both parties, as if made at the times fixed, and the plaintiff cannot take advantage of the stipulation that the sum should become due on failure to pay any instalment, or the defendants rely upon it as making the whole debt due and fixing the period from which the time of limitation ran." But we are unable to accept that view. There is nothing in the Limitation Act (XIV. of 1859) to give any such effect to an acceptance of part payment after the whole debt has become due. The creditor is, no doubt, not bound immediately to sue for, or insist upon payment of, the whole debt. He may, if he chooses, show forbearance towards his debtor, and accept a part of what is due. But, if he does so, he does not thereby prevent, or change in any way, the operation of the law of limitation, which, notwithstanding any such subsequent wish on his part, begins to run from the time of the first default rendering the whole amount due: see *Hemp vs. Garland* (1); *Hurronath vs. Makeeroolah* (2); *Karuppanna vs. Nallamma* (3); *Narayanappa vs. Bhaskar* (4); *Navalmal vs. Dhondiba* (5).

In equity it has been held that, a debt being presently due, an agreement to pay by instalments, with a stipulation, that on default the creditor may demand immediate payment of the whole balance due with interest, is not to be relieved against: *Sterre vs. Beck* (6).

Assuming, therefore, that the alleged part payment by the defendants really took place, if the plaintiff in this case had chosen the very next day after such payment to sue for the whole of the amount then remaining unpaid, he might have done so, and we do not think the defendants in that case could have successfully contended that no cause of action had accrued, or that the suit was premature because the second instalment had not fallen due.

We must, accordingly, hold that the right to bring this suit accrued to the plaintiff on the 2nd October 1868; that, having omitted to bring it for more than three years, he now comes too late; and that the decrees of the Lower Courts rejecting his claim on that ground are correct, and must be upheld.

* 5, Bomb. H. C. Rep., 35.

(1) 7, Jur. 302. (2) 7, W. R. (F. B.) 21. (3) 1, Mad. H. C. Rep., 209. (4) 7, Bom. H. C. Rep., 125, A. C. J. (5) 11, Bom. H. C. Rep., 155. (6) 32, L. J. Ch., 682.

ON DAMAGES FOR INJURY TO CHARACTER AND FEELINGS.

Injury to character by slander is rarely such as to demand large compensation, unless some special damage has been sustained, as in the case of a servant, or a clerk, who loses employ in consequence of defamation: in such cases, the compensation should be adequate to the loss; and so also in the case of a tradesman, or a professional man, whose business has been reduced by depreciating his credit or skill. When the object is merely exculpation, damages should be small, though substantial, a sum of Rupees two hundred at the greatest will atone for all the injury that any man can receive from verbal and undeserved reproach. Character must already be very low, if an action for defamation is necessary to acquit a man of the reputation of being a rogue or a felon, because an angry neighbour has called him by the opprobrious term; where an action is resorted to, not for exculpation, but for satisfaction, it still less deserves encouragement; such an action for slander alone, is in its nature vindictive, nor can any apology be suggested for it, except that as angry feelings must have vent, it is better for them to expand in the way of litigation than of personal encounter: if human infirmity is such that man must resort either to law or to blows, then it is expedient to favor the first alternative; still, damages must be proportioned to injury, and the actual injury derived from foul language is small indeed, even in the most aggravated case: we have no remark to offer on the principle of assessing it beyond this, that the damage is commonly in an inverse ratio to the rank of the complainant; even when no special damage can be proved, a servant is entitled to more compensation for being called a thief, than the master to whom the same term may happen to be applied with equal malice.

(1) Damages are not awardable for a groundless and malicious charge of abetment of riot and murder. 5, W. R., 134.

(2) The mere failure of a complainant in proving a *bond fide* criminal charge does not make him liable to an action for damages for defamation. 5, W. R., 282. (Brojonath Roy.)

(3) A suit for damages for mere verbal abuse, without actual injury and damage done, does lie in the Civil Courts. 1, W. R., 19. (Moulvi Gholam Hossen Vakeel.)

(4) Damages may be recovered for injury to one's reputation. 7, W. R., 117. (Ramjeebun Mookerjee.)

(5) In a suit to obtain damages for defamation contained in a letter written and sent by defendant to plaintiff, where the only damage alleged was injury to plaintiff's feelings,—*Held* that such injury was not in itself a ground for giving damages in a civil action. 10, W. R., p. 184. (Komul Chundra Bose.)

(6) A father, as guardian of his minor son, can sue to recover damages for personal injuries received by the son. 9, W. R., 327. (Modhoosudun.)

(7) In an action for damages against N for bringing a false and malicious charge, and against M for being the instigator, and others for giving false evidence in the case,—*Held* that plaintiff's failure to prove instigation on the part of M did not affect the claim against N, and upon the defendant N to show that he had reasonable and sufficient cause for bringing it, and if he failed to show such cause, malice might be inferred.—*Held*, further, that plaintiff could not recover damages against the defendants who were witnesses, but his proper course was to obtain the leave of the Magistrate to proceed against them for perjury. 11, W. R., p. 42. (Beshonath Rukhit.)

(8) A suit for damages for personal injury cannot be tried by a Court of Small Causes, unless some actual pecuniary damage has resulted from the injury. 12, W. R., 477. (Ali Buksh.)

(9) A plaintiff who comes into Court with a monstrously exaggerated statement of injury sustained, is only rightly served if the Court dismisses his claim *in toto*, although some injury was found to have been sustained by him. 8, W. R., p. 476. (Thakoor Lalut Narain Deo.)

(10) If A. having reasonable grounds for believing that B has stolen his property, prosecutes him for theft, the acquittal of B. is no ground for recovering damages in a civil suit against A. 6, W. R., 245. (Mohendro Nath Dutt.)

(11) Damages cannot be claimed for mere abuse or threatening language. 12, W. R., 369. (Phoolbasse Koer.)

(12) In estimating damages for a malicious prosecution, a Civil Court is not necessarily wrong in taking into consideration the plaintiff's feelings. 12, W. R., p. 89. (Huro Lal Biswas.)

(13) Injury might result to a man's feelings from abuse such as would entitle him to damages. 6, W. R., 151. (Shaik Tukee.)

(14) Greater damages are not necessary for defamation of the character of a Principal Sudder Ameen's Vakeel than for that of a Sudder Ameen's Vakeel. 6, W. R., p. 25. (Ramsoonder Mookerjee.)

(15) In a suit for damages for defamation of character, the plaintiff is not required by any absolute rule of law to give affirmative evidence of the falseness of the charge.

Quære.—Before a suit can lie in a case of this kind, is it necessary to presume that actual pecuniary damage has resulted? 12, W. R., 372. (Dhurmo Doss Koondoo.)

(16) In an action for damages for severe assault, the defendant being unable to prove provocation, the lower Court's decree against him was in the main upheld; but as, looking to the position of the defendant, the damages awarded were deemed beyond his means, they were reduced on condition of the defendant tendering to the plaintiff a written apology expressing his regret for what had passed. 6, W. R., 95. (J. K. Mac-Iver.)

(17) Special damages are not necessary to be proved in a case of slander and assault. W. R., 1864, p. 302. (Meer Hossein.)

(18) In a suit for damages for an assault made without provocation, the damages given should be commensurate to the injury and annoyance caused, even though there has been no serious personal injury sustained. W. R., 1864, p. 370. (Ramjoy Muzoomdar.)

(19) A suit will not lie to obtain damages for defamation contained in two letters written and sent by defendant to plaintiff, when no other publication was alleged, and no other injury than that of injury to the plaintiff's feelings. 6, N. W. P. High Court Rep., p. 38. (Mahomed Ismail Khan.)

(20) Assault and abusive language were held to have the effect of injuring one's reputation and outraging his feelings; although mere verbal abuse without consequent injury would give no claim to damages. 18, W. R., p. 531. (Chunder Nath Dhur.)

(21) In a suit for damages on the ground that defendant made a false charge of defamation against plaintiff and had him arrested and taken before the Magistrate who dismissed the charge, *Held* that the essence of the case lay in the question whether or not the complainant had reasonable ground for complaining before the Magistrate that the plaintiff had defamed him. Malice would be inferred from the absence of reasonable cause. 20, W. R., 177. (Gunga Persaud.)

(22) A suit for recovering damages for abuse will lie in the Civil Court. 16, W. R., p. 83.

 SHORT NOTES.

PRIVY COUNCIL.

Family Custom—Regs. XI. of 1793 and X. of 1800—Discontinuance of Family Custom.

In a suit to recover possession of an estate by virtue of an alleged family custom, under which the estate was descendible to the eldest son to the exclusion of the other sons, and was impartible and inalienable, it was uncertain what the nature or origin of the tenure of the estate was, but there had been admittedly a settlement of it by Government at the time of the perpetual settlement. *Held*, assuming the custom to have existed, that although by such settlement any incidents of the old tenure of the estate were impliedly at an end, yet the settlement did not of itself operate to destroy the family usage, even though the origin of it could not be shown.

Quere.—Whether Regulation XI. of 1793 or Regulation X. of 1800 would govern a case where the claim rested only on a continuing family usage?

Held on the evidence, that from the acts of the members of the family the manner of succession to the estate, even if it prevailed as alleged, was probably not regarded by them in the light of a family custom, but as one of the incidents or conditions of tenure, and that since the settlement by Government the family had considered all these incidents at an end, and had treated the estate as an ordinary estate held under the Government, and subject to the ordinary laws of succession. Assuming the custom to have existed, it was of a nature which could, without any violation of law, be put an end to. There appears to be no principle or authority for holding that a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued either accidentally or intentionally, so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom, which is the *lex loci* binding all persons within the local limits in which it prevails.

Vide 1, Indian Law Reports, Calcutta Series, p. 186. (Appeal from Calcutta High Court). The 23rd, 24th and 25th July and 26th November 1872—Rajkissen Singh, *vs.* Ramoy Surma Mozoomdar.

CALCUTTA HIGH COURT.

Review—Act VIII. of 1859, s. 376—Error in Law.

The production of an authority which was not brought to the notice of the Judge at the first hearing, and which lays down a view of the law contrary to that taken by the Judge, is not a sufficient ground for granting a review.

Vide 1, Indian Law Reports, Calcutta Series, p. 184. (Sir Richard Garth, Kt, C. J., and Birch, J.) The 28th August 1875—Ellen and another vs. Basheer and another.

Bengal Act VIII. of 1869, s. 98—Suit for Value of Crops—Distrain—Jurisdiction—Small Cause Court.

The plaintiff made a complaint to the Magistrate against the defendant, his landlord, for forcibly carrying away his crops, whereupon the defendant was tried, convicted of theft, and punished. The plaintiff then instituted a suit against the defendant in the Munsiff's Court, apparently under s. 95 of Beng. Act VIII. of 1869, and obtained a decree declaring the dstraint to be illegal, and directing the crops to be given up to him. The defendant offered to give up a smaller quantity than was mentioned in the decree. The plaintiff refused to take the same, and brought a suit in the Small Cause Court to recover the value of the quantity he had claimed before the Munsiff and something additional. *Held*, that the Small Cause Court had no jurisdiction, and that the suit ought to have been brought under s. 98 of Beng. Act VIII. of 1869.

Vide 1, Indian Law Reports, Calcutta Series, p. 183, (Sir Richard Garth, Kt, C. J., and Macpherson, J.) The 15th July 1875—Hyder Ali vs. Jafer Ali.

BOMBAY HIGH COURT.

Hinda Law—Effect of illegitimacy on the right of succession—Dasi-putra—Pāṭ marriage or re-marriage amongst Sudras.

The general result of the authorities, both juridical and forensic, is that among the three regenerate classes of Hindus, Brahmins, Kshatriyas, and Vaishyas, illegitimate children are entitled to maintenance, but cannot inherit, unless there be local usage to the contrary; and that, among the Sudra class, illegitimate children, in certain cases at least, do inherit.

According to Vijayaneshvara, the author of the Mitakshara (Chap. I., Section 12), the father of an illegitimate son by a *Dasi* among Sudras may in his (the father's) life-time allot to such son a share equal to that of a legitimate son, and, if the father die without making such allotment, the illegitimate son by the *Dasi* is entitled to half the share of a legitimate son, and, if there be no legitimate son and no legiti-

After son or such a daughter, the illegitimate by the *Dasi* takes the whole estate. If, however, there be a legitimate daughter or legitimate son of such a daughter, the illegitimate son would take only half the share of a legitimate son, and such daughter or daughter's son would take the residue of the property, subject to the charge of maintaining the widow of the deceased proprietor.

The *dictum* of Lord Cairns in *Sri Gajapathi Rudhika vs. Sri Gajapathi Nilamani* (13, Moore Ind. App., 497, S. C., 6, Beng. L. R., 202; 14, Calc. W. R., P. C., 33, reversing 2, Mad. H. C. Rep., 369,—“Supposing the sons, or either of them, to have been legitimate, the widow (of Padmanabha) could have been entitled to maintenance only. Had both the sons been illegitimate, their claim, unless some special custom governed the case, (which is not in proof,) would have been to maintenance only. In this last-named case the widow would have had the ordinary estate of a Hindu widow”—commented upon and explained.

The condition that, in order to entitle the illegitimate offspring of a Sudra woman by a Sudra to inherit the property of the latter, or a share in it, she should, according to Jimuta Vahana and Nilkantha, be an unmarried woman, has, in practice, been discarded in the Presidency of Bombay.

In this Presidency the illegitimate offspring of a kept woman, or continuous concubine, amongst Sudras, are on the same level as to inheritance as the issue of a female slave by a Sudra.

The sons of a *Punarbhū* (twice-married woman) by a duly-contracted *Pāt* marriage, *i. e.*, in accordance with the custom of the caste, are legitimate and, as to the right of inheritance and extent of shares, rank on a par with the sons by *lagna* marriage.

G, a Sudra woman, was married to T (also a Sudra) by *Pāt* marriage, without having received a *chhor chiti* (release) from her first husband, who was then living, obtained any other sanction of her *Pāt* with T:—

Held that the intercourse between G and T was adulterous, and that, therefore, the plaintiff, their son, being the result of such intercourse, was not entitled to take as *heir* even to the extent of half a share, and was not a *Dasiputra* within the scope of Yajnyavalkya's text, or recognized as such by other commentators. He was, however, held entitled to maintenance, as he had been recognized by T as his son.

Vide 1, Indian Law Reports, Bombay Series, p. 97. (Westropp, C. J., and Larpent, J.) the 7th September 1875. Rahi vs. Govinda Valad Teja.

Hindu Law—Contract—Married woman—Capacity of a Hindu female to enter into a contract without her husband's consent—When such contract is binding on the husband—Stridhan.

Under the Hindu law a wife who has voluntarily separated from her husband, without any circumstances justifying her separation, is liable for debts contracted by her (even for necessities), although without her husband's consent; but her liability is limited to the extent of any *stridhan* she may have.

Vide 1, Indian Law Reports, Bombay Series, p. 121, (Westropp, C. J., and Nanabhai Haridas, J.) The 16th February 1876—*Nathubhai Bhailal vs Javher Rajji*.

Will—Probate—Annuity—"Value"—Court Fees Act (VII. of 1870), Schedule I. Clause 11.

For the purpose of determining the probate fee to be paid in respect of an annuity the word "value" in the Court Fees Act (VII. of 1870), Schedule I, Clause 11, must be taken to mean the market value of the annuity, and not ten times the amount of a yearly payment.

Where the property, in respect of which probate is sought, is mortgaged, the amount of the mortgage incumbrance must be deducted from the market value of the property, and the probate fee charged on the balance.

Vide 1, Indian Law Reports, Bombay Series, p. 118, (Westropp, C. J.) The 20th January 1876—*Vinayakrav Ramachundra Lakshmanji*.

Injunction—Libel—Ultra vires—Bombay Act I. of 1873.

The Court will not grant an injunction to restrain the publication of a libel; nor to restrain, at the suit of an individual, an act of a corporate body, on the ground of such act being *ultra vires*, except where such individual has been damaged by such act in his rights of ownership, commodity, or easement.

There is no authority for the proposition that an individual is entitled to protection by way of injunction against the act of a corporation, though in excess of their powers, which affects that individual's character and reputation, whether private, professional, or commercial, which he would not have been entitled to had the act complained of been committed by an individual defendant, on the ground that the act in question was one which the corporation had no power to do under the instrument of incorporation.

The Trustees of the Port of Bombay have the power to record their decisions and opinions with regard to matters connected with the business they have under their Act power to transact; whether such decisions or opinions are confined to statements of what they believe to be actual facts, or extend also to the giving of advice for the conduct of their successors in office with regard to such business, and whether the expression of such decisions, opinions, or advice may or may not contain statements injurious to the character or reputation of others.

Where therefore, the plaintiff sought for an injunction to restrain the Trustees of the Port of Bombay from publishing two resolutions alleged to reflect injuriously on his character and reputation, on the ground that it was not within the powers conferred on the Trustees by Bombay Act I. of 1873, to discuss or pass resolutions affecting his character, and that the publication of such resolutions was calculated to injuriously affect him in his commercial relations with Government,

Held that the injunction could not be granted.

Held also that though the Court, under certain circumstances, might have the power of so framing an order for injunction as to produce the effect of cancelling the minutes of a resolution recorded in the books of a corporate body, yet that it could not order the Trustees of such body to pass and record a resolution dictated by the Court.

Vide 1, Indian Law Reports, Bombay Series, p. 132, (Green, J.) The 30th March 1876—*Shepherd vs. The Trustees of the Port of Bombay*.

HIGH COURT, N. W. P.

Act X. of 1872, s. 297—High Court—Powers of Revision—Judgment of Acquittal.

The High Court is not precluded by a judgment of acquittal from exercising its powers of revision under s. 297, Act X. of 1872.

Vide 1, Indian Law Reports, Allahabad Series, p. 139. (Full Bench). The 19th February 1876—*In the matter of Hardeo*.

Act X. of 1872, s. 390—Convicted Person—Bail—Sessions Court.

The Court of Session has no power, under s. 390, Act X. of 1872, to admit a convicted person to bail, a *convicted person* not being an *accused person* within the meaning of that section.

Vide 1, Indian Law Reports, Allahabad Series, p. 151. (Full Bench.)—The 16th February 1876—*Queen vs. Thakur Pershad*.

THE MORALITY OF THE BAR.

"I asked him," says Boswell, speaking of Dr. Johnson, "whether, as a moralist, he did not think that the practice of the law, in some degree, hurt the nice feeling of honesty.

Johnson. "Why no, sir, if you act properly. You are not to deceive your clients with false representations of your opinion : you are not to tell lies to a judge.

Boswell. "But what do you think of supporting a cause which you know to be bad ?

Johnson. "Sir, you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly ; so that your thinking, or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself, may convince the judge to whom you urge it ; and if it does convince him, why, then, sir, you are wrong, and he is right. It is his business to judge : and you are not to be confident in your own opinion, that a cause is bad, but to say all you can for your client, and then hear the judge's opinion."

So said Erskine : "From the moment that any advocate can be permitted to say that he *will*, or will *not*, stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend from what *he may think* of the charge or of the defence, he assumes the character of the judge ; nay he assumes it before the hour of judgment, and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel."

"There is, undoubtedly", said Coleridge, "a limit to the exertions of an advocate for his client. He has a right—it is his bounden duty—to do every thing for his client, that his client might honestly do for himself, and to do it with all the effect which any exercise of skill, talent, or knowledge of his own may be able to produce. But the advocate has no right, nor is it his duty, to do that for his client, which his client *in foro conscientie*, has no right to do for himself : as, for a gross example, to put in evidence a forged deed or will, knowing it to be so forged."

In our opinion, the duty of the advocate is to state, as forcibly as he can, the best arguments he can devise in his client's favor, leaving the value of these arguments, as well as the merits of the case, to be decided by the only individual who has the power of reaching the truth—the judge. “He is perfectly justified,” says a writer in the *FRIEND OF INDIA*, “in defending a man whom he believes to be guilty—nay more whom he knows to be guilty. This does not mean that he may do anything for his client which he may not do for himself. He may not mis-state facts, or seek to substantiate what he knows to be a fraud. His duty is to see, however hopeless his client's case, that the charge is strictly proved and that if he is convicted, he is convicted according to law. He may and ought to take advantage of any weakness exhibited by the prosecution, and avail himself of every technical ‘objection’ that he thinks may tend to save his client. The plea of ‘not guilty’ is not to be taken as an assertion of moral innocence. The word ‘guilty’ implies much more than that the accused person committed a particular act. It implies that he committed it when sane, and with such intention, and under such circumstances, that his act amounts to a legal offence. It is one thing to kill a man, another to commit murder. And if—a very unlikely case indeed—a man were to come to me, accused of a crime, and confess it to me in such a way as to leave no doubt in my mind but that he deserved the punishment of the law, I should feel bound on the proper fee being paid to undertake his defence, unpleasant as the task would be. My duty would be to see that everything was strictly proved against the prisoner : but I should be clearly wrong if with the knowledge I possessed, I sought to save him by directing suspicions against an innocent person.* * * I have said that a Counsel is justified, in defending a man whom he knows to be guilty : that is to say that he is entitled to call upon the accuser to strictly prove the offence urged against his client. But he is not of course justified in supporting a charge against a man, which his client tells him is false. In the first case he does what he may do for himself, and what is in strict accordance with law. In the other instance he does for another what he may not do for himself ; and lends himself knowingly to be the instrument of a great wrong. However black a man's offence is, he has a right to have it proved before he is punished for it ; but no man is justified in stating deliberately what he knows to be untrue. But as a matter of fact, it is an exceedingly rare occurrence for a barrister to have any personal knowledge of the truth of the fact which he is required to lay before a judge. The English

system which requires the intervention of a third person who is an expert, renders it peculiarly unlikely that such a one would inform the Counsel he instructs of his client's guilt, and thus do all he could to cramp the Counsel's energies. Here in India, where a barrister is often instructed directly by his client, the former it seems to me may safely undertake almost any case, as even after the most patient investigation before an acute judge it is difficult enough to say where the truth lies. There is doubtless a right and a wrong side to every case; but as long as a Counsel is careful never to state what he knows to be false, he may uphold either side, it being the judge's duty and not his, to pronounce which is the right and which the wrong side."

BOMBAY HIGH COURT.

The 16th February, 1876.

PRESENT :

Mr. Justice Westropp, *Chief Justice*, Mr. Justice Kimball, Mr. Justice West, and Mr. Justice Nanabhai Haridas.

REG., vs. RAHIMAT.*

Compounding of offences—Voluntarily causing grievous hurt—The Indian Penal Code, s. 214—The Criminal Procedure Code (Act X. of 1872) s. 210.

Whenever the words "voluntarily," "intentionally," "fraudulently," "dishonestly," or others, whose definition involves a particular intention, enter along with a specified act into the description of an offence, the offence not being one irrespective of the intention, is not one which the exception to section 214 of the Indian Penal Code by itself allows to be compounded. The offence, to admit of compromise, must be one in this sense irrespective of the intention, and it must be one for which a civil action may be brought at the option of the person injured, instead of criminal proceedings.

The offence of voluntarily causing grievous hurt cannot accordingly be compounded.

The judgment of the Court was delivered by

WEST, J.—Section 188 of the Code of Criminal Procedure says that "in the case of offences which may lawfully be compounded, injured persons may compound the offence out of Court or in Court with the permission of the Court," and that "such withdrawal from the prosecution shall have the effect of an acquittal of the accused person." The case before us is one in which an accusation of voluntarily causing grievous hurt has been compounded with the permission of the Court;

and the question is, whether this is a case of an offence "which may lawfully be compounded."

The remedies provided by the law for wrongs which it recognizes as affording a proper ground for the exercise of the State's coercive power, may be classed generally as criminal and civil. The latter apply properly to wrongs not regarded as so flagrant and so dangerous to society at large as to call for the spontaneous interference of the State. The general well-being of the community is sufficiently protected by the exercise of power at the desire of the person injured, and on proof of the wrong. The object is in theory not penal, but remedial or compensatory.

Criminal sanctions, on the other hand, are intended to enforce duties regarded as of such importance to the community that the option of insisting on them, or of bringing the provided penalty to bear in cases of their infringement, cannot safely be left in the hands of private persons. In such cases the State, through its representatives, steps in either on a denunciation duly made, or of its own accord, to bring the wrong-doer to justice; and it regards this object as one of such paramount importance that it will not allow any purely remedial arrangement between the person injured and his injurer, by which the punishment prescribed for the latter may be avoided.

The views taken, however, at different times and under different influences, of the enormity of particular wrongs vary widely; and there are wrongs which, while they fall within the same general description, may, according to circumstances, be of an extremely pernicious, or of but a slightly pernicious, tendency. They may endanger the welfare of society, or they may affect, except in some inappreciable degree, only the interests of an individual. Hence there comes to be recognized a class of cases which may be the subjects either of criminal or civil cognizance. If the person injured desires to obtain compensation, the law does not forbid him; if he invokes the penal interposition of the Magistrate, that interposition is not refused.

Full competence to accept satisfaction for wrongs done to oneself follows necessarily from the general rule of freedom of transactions. That rule, however, and the deduction from it, are subject to limitations in the interest of the community through which some compromises of offences are made penal, and others are so disapproved that the Courts will not give effect to them. These limitations correspond generally to the classes of wrongs for which, though a personal injury has been sus-

tained, a civil suit is not allowed, or is allowed only after the public interest has been satisfied by a prosecution, the instituting of which is by the British Indian, as by the English, law regarded as a duty resting on the person injured, and one which he is not at liberty to neglect in consideration of any advantage to himself.

Sections 213 and 214 of the Indian Penal Code are intended to prevent the suppression of prosecutions in cases in which the public is thought to be deeply interested in the punishment of the offender. They impose penalties on transactions entered into with this view. But after the rules have been laid down in terms extending to all compromises of offences, an exception is made that "the provisions of Sections 213 and 214 do not extend to any case in which the offence consists only of an act irrespective of the intention of the offender, and for which act the person injured may bring a civil action." The words "may bring a civil action" seem to mean "may bring an action without, or instead of, instituting criminal proceedings." On the principle of "*ubi jus ibi remedium*" there are but few, if any, violations of right recognized by the law as occasioning personal injury, for which, when the demands of criminal justice have been satisfied, a civil action may not be brought by the person injured; and the condition of a civil action being competent to the party injured after a prosecution could not have been intended where the design is to define and circumscribe the bounds within which private compromises of offences are permissible. The graver the injury in such cases, so long as the injured person survives, the better founded the claim for civil reparation. Where the law allows a choice between the criminal and the civil remedy, the exception says that a compromise shall not be penal by which the person injured obtains what civil proceedings would give him. The taking and giving of a compensation which the law forbids, instead of a criminal prosecution, is the gist of the offences in Sections 213 and 214; but where the law would itself award a compensation, the exception allows the compromise.

The condition thus construed at once cuts down the cases in which compounding is not penal to a limited class. Unless a "suit of a civil nature," according to Section 1 of the Code of Civil Procedure, can be maintained in the first instance by the person injured against the injurer, they are not at liberty to enter into a transaction by way of compromise. They are subject to the penalties of Sections 213 and 214 of the Indian Penal Code should they attempt thus to defeat its purpose. In all the more serious cases of wrong doing by which personal injury

is sustained, no such action could, according to the recognized principles of the English law, be maintained. The criminal law, wherever those principles are accepted, must first be put in motion, before civil redress for the private wrong can be effectually sought. That these principles were accepted, at least generally, by the Legislature when it passed the Penal Code, is, we think, sufficiently apparent from the test it has provided; and according to these it is only in cases comparatively trivial—at least, of trivial importance to the community at large—that an action can be brought without a prior prosecution. In no others is a compromise free from the penalties prescribed by Sections 213 and 214 of the Indian Penal Code.

The other condition, that the “offence consists only of an act irrespective of the intention”, seems to have the same general purpose of confining compromises to the cases of almost venial offences. The words “irrespective of the intention” seem to mean that the definition of the offence extends only to acts, not to a particular intention prompting or accompanying the acts. Thus the several instances of negligence constituting an offence without a positively mischievous purpose, are cases in which the “offence consists only of an act.” No intention is, or needs be, imputed as an element of the offence. In other cases the act—as, for instance, waging war against the Queen, or committing adultery—though it may be essentially voluntary, is still conceived, for the purpose of the definition or of the imposition of punishment, simply as an act. If the act, as thus viewed by the Legislature, is done, the offence is committed, and the penalty is incurred “irrespective of the intention of the offender.” In all cases of this kind for which the Indian Penal Code provides, the act is either one, as negligently allowing a prisoner charged with, or convicted of, an offence to escape, for which no civil action could be brought, and on that ground excluded from the operation of the exception: or else, as in the case of adultery, of a kind regarded as of a specially personal character, so that the public peace and welfare will be rather furthered than impaired by allowing a private settlement of the wrong.

In contrast to these cases stand the great mass of offences which arise in the ordinary course of affairs. In the definitions or descriptions of these in the Penal Code the intention is an essential element. The mere act, not perhaps in itself, but as viewed by the Legislature, is regarded as possibly ambiguous, and is not an “offence irrespective of the intention of the offender” according to a distinction well expressed

by Lord Mansfield, C. J., in the case of *R. V. Shipley* (4, Dong. p. 165). Thus, in cases of theft, personal violence, threats, and defamation, the physical act must spring from a dishonest or malicious intent in order to constitute an offence. This was the class of cases which probably was most conspicuous to the Legislature when the exception to Section 214 was made law. The offences are of a kind regarded as highly dangerous to society, and not, therefore, proper subjects of compromise. As their definitions involve intention, they were excluded from the exception by limiting it to cases of offences constituted by "acts irrespective of the intention of the offender."

The result appears to be that whenever the words "voluntarily," "intentionally," "fraudulently," "dishonestly," or others, whose definition involves a particular intention enter along with a specified act into the description of an offence, the offence, not being one "irrespective of the intention," is not one which the exception to Section 214 of the Indian Penal Code by itself allows to be compounded without the parties incurring the penalties prescribed by that and the next preceding section. The offence, to admit of compromise, must be one in this sense irrespective of the intention; and it must be one for which a civil action may be brought at the option of the person injured, instead of criminal proceedings.

This construction of the exception does not, indeed, clear away all difficulties. It seems anomalous that, while adultery, through its definition not including any statement of intention as an element of the offence, may be compounded, enticing a woman away with intent to commit adultery with her may not be compounded. The anomaly may, perhaps, be explained by the circumstance that mere adultery may be a wholly private transaction, which the husband may hope to keep secret, while enticing a woman away, necessarily involves a public scandal; but, such as it is, it is in a measure corrected by the provisions of the Code of Criminal Procedure (Sections 478, 479), which make the prosecution of the offender in the one case, as in the other, dependent on the will of the husband. The attempt to compress a principle gathered from a great number of instances within a few words generally, leaves some cases not provided for in a quite satisfactory way; and the existence of such cases is not a sufficient argument against a particular construction, unless some other can be suggested which gets rid of all difficulties.

The illustrations to the exception, so far from throwing light on

its meaning, create the chief difficulties in its construction. Illustrations (a) and (b) taken together, if we take "assault," as Section 7 bids us do, in the sense defined by Section 351, suggest that the true sense of the exception is to allow compounding in every case that might be the subject of a civil action, except where the act constituting an offence is made a graver offence by some intention accompanying it, which is not involved in the definition of the minor offence, which the act would *prima facie* amount to. The condition that, for the exception to operate, the act must be one for which a civil action might be brought before taking criminal proceedings, would, on this construction, as on the other, cut down the possible cases of compromise to a small number, where the principles of the English law on this subject prevail; but, allowing this, the difficulty remains that the suggested construction is one that is not by any ingenuity to be gathered from the language of the exception itself. If we take "assault" in its defined sense, it is not an offence constituted by "an act irrespective of the intention." The physical act being the same in both cases, the intention accompanying it might make it an assault under Section 351, or an attempt to commit murder under Sections 511, 299, and 300 of the Indian Penal Code; and there is not, in any of the cases in which intention enters into the definition of an offence in that Code, such an inseparable connexion of a particular intent with a particular act, that such intent is to be conclusively inferred from it; otherwise the intention would not be specified as part of the definition. But if the act thus derives all its criminal character from the particular intent accompanying it, it cannot be said that a minor offence is constituted by the act irrespective of the intention, while a major offence is constituted by a similar act along with some different or additional intention. There is no offence at all until there is a criminal intention; and when this accompanies the act, it at once determines the character of the offence, be it graver or more venial.

The illustrations of the Penal Code rank as cases decided upon its provisions by the highest authority. But as every authority may sometimes err, we are justified in asking whether this may have happened in the present instances. Illustration (b) says:—"A assaults B. Here, as the offence consists simply of the act irrespective of the intention of the offender, &c." This conception of the meaning of assault is obviously quite at variance with that which governed its definition in Section 351. The Legislature conceived of assault as consisting, as viewed by the law, in

some mere act. In illustration (a) an intention is superadded to this act, so that an attempt to commit murder is constituted an offence consisting by its definition of an act *plus* an intention, and thus not within the exception according to the construction which we have preferred. Illustrations (c) and (d) are equally reconcilable with either interpretation.

Amongst the cases actually decided on the exception there is one at 9, Madras Jurist, 311, in which it was ruled that a charge of dishonest appropriation under Section 404 of the Indian Penal Code could not legally be compounded. In the case cited from 3, Rev. Civ. and Cri. R., 14, S. C. Ct. References, a compromise in a case of wrongful restraint was successfully sued on; but wrongful restraint being punishable with but one month's imprisonment, a withdrawal from the prosecution is expressly allowed by Section 210 of the Code of Criminal Procedure; and as Section 188 of that Code cannot but have been meant to have some operation, an agreement for such withdrawal could not be illegal. The case at 22, Cal. W. R., 26, Cr. Rul., was one of kidnapping, and the Court held that it could be lawfully compounded. Ainslie, J., seems to have inclined to the view that this was allowable, because there was not an intention to commit an offence beyond that of simple kidnapping, and because a civil action might be maintained, but it does not appear that the obvious grammatical construction of the exception had been considered by him. Kidnapping, though a voluntary act, is not, according to its definition in the Penal Code, composed of an act *plus* intention, but of an act alone. It is, though necessarily involving an intention, conceived of and dealt with by the Legislature as a mere act; and being thus an offence irrespective of the intention would, according to our view, admit of a compromise if the second condition were satisfied, namely, that a civil action might be maintained for the wrong by the injured person. It is not certain from the language of Ainslie, J., that this was not his view also; but, if not, the decision is, we think, to be sustained where a civil suit is admitted, independently of the reasons given for it.

The case of *Jetha Bhala*, at 10, Bom. II. C. Rep., 68, is more distinctly against what we think the correct construction. But no reasons are given for that decision, and the case does not appear to have been argued. If the offence of voluntarily causing hurt may be compounded, so apparently might causing grievous hurt, or even an attempt to commit murder. For the mere act and the personal injury sustained from it, apart from any special criminal intent, the person injured

might, in each case, maintain a civil action; and there would not in either be an aggravating intention placing the offence in a graver category than that to which it would ordinarily belong. If the act was thought to include the intention ordinarily accompanying it, and thus in a manner to be one, in the eye of the law, irrespective of the intention, we do not think that such a construction is admissible in any case in which the Legislature has expressly made a particular intention part of the definition of an offence. It may be easy to infer the motive in any ordinary case from the act and the circumstances but that the inference was not intended to be a necessary and conclusive one, is clear from the specification of the intention in defining the offence. We think, therefore, that that case was not rightly decided, and that an offence, in the definition of which a particular intention is included, cannot be compromised legally, or without incurring a penalty, except in the petty cases provided for by Section 210 of the Code of Criminal Procedure. If the intention does not enter into the definition of the offence, it may be compounded in all cases in which a proceeding by way of civil action, instead of a criminal prosecution, would be competent to the person injured.

The offence of voluntarily causing grievous hurt is, accordingly, one which cannot legally be compounded. The Magistrate's order of dismissal must, therefore, be reversed as contrary to law.

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CALCUTTA HIGH COURT.

The 2nd September, 1875.

PRESENT :

Sir Richard Garth, *Kt*, *Chief Justice*, and Mr. Justice Birch.

NOBO DOORGA DOSSEE* and another (Plaintiffs) *Appellants*,

versus

FOYBUX CHOWDRI, (Defendant) *Respondent*.

Res judicata—Act VIII. of 1859, s. 2—Suit for Rent—Subsequent Suit for Abatement of Rent.

Where in a zemindar's suit for rent, the ryot claimed abatement of a certain sum, but the Court only allowed a smaller amount, a subsequent suit by the ryot claiming a permanent abatement of the amount at first claimed was held not to be maintainable, the question being *res judicata*, i. e., having been raised and decided in the former suit.

Vide 1, Indian Law Reports, Calcutta Series, p. 202.

In this case, the plaintiff obtained a putni lease of certain villages from the defendant in 1861 at an annual rent, and in 1865 was evicted from a portion of the property : she took no steps to obtain an abatement ; but inasmuch as she did not pay any rent for the year 1871, the defendant brought a suit against her for the rent of that year. The plaintiff set up the defence that she was entitled to an abatement of Rs. 155 from her rent ; the 155 rupees representing the annual value of the property which she had lost in consequence of the eviction. In that suit it was decided that the amount of abatement she was entitled to was Rs. 42. No appeal was made against that decision. In a suit brought by the plaintiff for the purpose of obtaining a permanent abatement of her rent she claimed the precise measure of abatement, viz., Rs. 155, which she had claimed in the suit brought against her by the defendant.

GARTH, C. J.—(In delivering judgment, said :)—The plaintiff brings this suit for the purpose, as she says, of obtaining an abatement of her rent for the future ; and she claims in this suit the precise measure of abatement, Rs. 155, which she had claimed in the suit brought against her by the defendant. The defendant's answer is, ' this question which you now seek to raise, has already been decided between us in the former suit. You claimed the same abatement then as you do now. You attempted to establish it upon the same grounds. You went into the question, not as if the abatement were for one particular year, but for the whole remainder of your interest ; and from the very nature of the question, you could not have gone into it upon any other basis.' The plaintiff's reply to this is—' no. Your claim then was for the rent of one year only : my defence must necessarily have been confined to that one year ; and the result could not bind either of us for the future.' This contention raises a very nice point upon the doctrine of estoppel ; as to which during the argument I confess that I personally have felt considerable difficulty.

There is no doubt as to what the law is upon the subject of estoppel. The difficulty is, in applying that law to such a case as the present. Each year's rent is in itself a separate and entire cause of action, and if a suit be brought for a year's rent, a judgment obtained in that suit, whatever the defence might be, would seem only to extend to the subject-matter of the suit ; and leave the landlord at liberty to bring another suit for the next year's rent, and the tenant at liberty to set up to that suit any defence she thought proper.

But it is said, on the other hand, that in the former suit between the defendant and the plaintiff, the entire question of what ought to be the permanent abatement of rent during the whole period of the lease, was substantially and necessarily tried and determined, and that they are neither of them at liberty to re-open that question. The principle upon which the abatement was made, the value of the land, the measurements, and other circumstances which form the materials upon which the Judge would estimate the amount of the abatement, would be applicable to one year as well as to another, and what was a just and proper abatement for the year 1871 would be an equally just and proper abatement in each succeeding year.

There certainly appears to be great weight in this reasoning, and there is no doubt that substantial justice will be done by adopting it.

Even assuming that the judgment in the former suit were not binding between the parties as an actual estoppel, it would afford such cogent evidence between them upon the point, that the Judge in this suit (in the absence of some entirely fresh materials) would be perfectly right in acting upon it; and we cannot doubt, that if we were to send the case back to the Lower Appellate Court with this intimation, the Judge would act upon it, as a matter of course; and the parties would only be put to additional expense to no purpose.

But happily, we are not without authority in this Court to guide us in coming to a conclusion. The cases which were cited in argument by the defendant's pleader—*Mohima Chunder Mozoomdar vs Asradha Dassia* (1) and *Rakhal Doss Sing vs. Sreemutty Heeramuttee Dosee* (2) seem very much in point; and we think we ought to act upon them. In one of those cases, the suit was brought by a landlord for one year's rent. The answer was, the land is rent-free—and a decree was passed against the landlord upon that ground. Another suit was afterwards brought by the landlord for another year's rent; and it was held, that as between the parties, it had been decided, that the land was rent-free; and that this decision was binding upon them not only for the one year, but for all future years.

In accordance with this, we hold that the question of abatement of rent has been determined in the former suit between these parties not only for one year 1870, but for all future years. The appeal will therefore be dismissed with costs.

(1) 15, B. L. R., 251.

(2) 23, W. R., 282.

BOMBAY HIGH COURT.

The 22nd March, 1876.

PRESENT :

Mr. Justice Melvill and Mr. Justice West.

YAMUNABAI* and another (Defendants) *Appellants*,*versus*NARAYAN MORESHVAR PENDSE (Plaintiff) *Respondent*.*Husband and Wife—Restitution of Conjugal rights—Cruelty.*

In a suit by a Hindu husband against his wife for the restitution of conjugal rights, the criterion of legal cruelty, justifying the wife's desertion, is the same in this country as in England, viz, whether there has been actual violence of such a character as to endanger personal health or safety, or whether there is the reasonable apprehension of it.

Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action for damages or injunction, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has by some insult, or ill-treatment, compelled her to leave him

Seem that a decree for restitution of conjugal rights between Muhammadans or Hindus may be enforced under Section 200 of Act VIII. of 1859.

MELVILL, J.—In this case the plaintiff asks that his wife, the first defendant, may be compelled to return to him, and that the second defendant, in whose house she has been living and who has opposed her return, may be ordered to deliver her up.

It has been faintly argued at the bar that a suit for the restitution of conjugal rights will not lie in our Courts, or, at all events, that a decree ordering such restitution cannot be enforced; and, in support of this argument we have been referred to a judgment of Mr. Justice Markby, reported at 14, Beng. L. R., 298. That judgment does not deny, and the decision of the Privy Council in *Moonshee Buzloor Ruheem vs. Shumsoonissa Begum* conclusively establishes that such a suit may be maintained. The question of the mode of enforcing the Court's decree is at present premature, and we only allude to it as affecting the question of the admissibility of the suit. If it were admitted that a Court could not enforce its decree, that would be a strong ground for holding that the Court could not entertain the suit. In the case above referred to, the Privy Council has expressed an opinion (which Mr. Justice Markby does not notice) that disobedience to the order of a Court directing the wife to return to cohabitation would seem to fall within the 200th Sec-

tion of the Civil Procedure Code, and to be enforceable by imprisonment or attachment of property, or both. The Bengal High Court (6, W. R., 105) had previously come to the same conclusion; and in *Ardasar Jehanghir Framji vs. Arabai* (9, Bom. H. C. Rep., 290) I have treated the question as settled by authority. We see no reason to entertain any doubt on the subject now. We are unable to agree with Mr. Justice Markby that a decree, which orders a wife to return to her husband's protection, amounts to nothing more than a declaration that the relation of husband and wife exists between the parties. In nine cases out of ten there is no dispute as to the existence of that relation; and a declaratory decree to that effect is not what the plaintiff asks, nor what the Court professes to give him. The policy of entertaining and enforcing such claims may be open to question; but, so long as their jurisdiction is not barred by legislation, our Courts have no discretion in the matter. In the case of Parsis the Legislature has, by Act XV. of 1865, made express provision for such suits and for the enforcement of the decree (section 36); and the cases to which we have referred are, we think, sufficient authority to support the action of our Courts in similar suits between Hindus and Muhammadans.

The question which we have to decide, as between the plaintiff and his wife, is whether the latter has proved a legal justification for the admitted refusal to return to her husband's house.

* * * * *

The plaintiff, as the Assistant Judge says, is admittedly a man of very low mental capacity, on the border line of idiocy. But Yamunabai has not alleged that she entertains any apprehensions to her safety on this account, nor indeed that she is unwilling to live with her husband on this account. On the contrary, on the same day on which the present suit was filed, she filed a counter-suit to obtain possession of her husband, alleging that he was of unsound mind, and that she was the proper person to have charge of him, but that his cousin, Ramchundra, refused to give him up. Her objection was not to living with her husband, but with her husband's relatives. Now it is easy to conceive that the annoyances of married life must be often much aggravated by the necessity which a Hindu wife is under of living in the same house with the whole of her husband's family; and ill-treatment at the hands of her husband's relations, from which he was powerless to protect her, might reasonably be urged as a ground for refusing to live with him. But no such ill-treatment has been alleged in the defendant's written

statement. It has, indeed, been suggested to us by the learned counsel for the special appellants that that statement implies much more than it expresses; that the first defendant left her husband's house in consequence of an attempt made upon her virtue by her husband's cousin Krishnaji; and we are asked to order the examination of certain witnesses, whose evidence, it is said, would establish this fact. Undoubtedly no Court would order a wife to return to her husband's house if she were liable to be exposed to an outrage of this description. But it is impossible to pay any attention to a mere verbal allegation made at this late period of the proceedings. If the defendant had so good a defence, she should have made it distinctly, and have raised an issue regarding it. She should, at least, have come forward to give evidence. She was summoned as a witness, and her pleader twice obtained an adjournment in order to produce her. But she remained absent, and her absence has never been accounted for. It is out of the question that the Court should now order an enquiry into the truth of an allegation which does not even appear on any part of the record, and which the person making it does not venture to substantiate upon oath.

There is one circumstance in this case, and one only, which raises any doubt as to the right of the plaintiff to the relief which he seeks. Soon after this suit was instituted, the plaintiff lodged a complaint before the Magistrate, charging the second defendant with having committed adultery with the first defendant. He swore that he had himself witnessed circumstances leading to the conclusion that adultery had taken place. He was disbelieved, and his complaint was rejected without enquiry. He then brought the matter before the higher Courts, but without success. In the present suit he has again put forward this charge of adultery, and has called his relations to support it. The Assistant Judge has found that the imputation is utterly groundless. We must take it, then, that the plaintiff and his relations, in their endeavor to gratify their hatred against the second defendant, have not hesitated to asperse the character of the plaintiff's wife. In his deposition before the Magistrate the plaintiff used a very opprobrious expression in reference to his wife, and when pressed with his inconsistency in wishing to recover possession of a wife whom he held in such low esteem, he said that, if she returned to him, it would be inconsistent with his religion to receive food and water from her hands, though in other respects he should treat her with the affection due from a husband to a wife. It has been much pressed upon us that the unjust aspersions cast

by the plaintiff on his wife amount to cruelty, and that the treatment to which he has himself said that he intends to subject her, would also amount to cruelty, and that on these grounds the defendant should not be compelled to return to his house.

In *Moonshee Buzloor Ruheem vs. Shumsoonissa Begum* their Lordships of the Privy Council say :—" It seems to them clear that, if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court." In the present case we are only concerned with the question of cruelty ; and on that point their Lordships, in another part of the same judgment, say :—" The Mahomedan law, on a question of what is legal cruelty between man and wife, would probably not differ materially from our own, of which one of the most recent expositions is the following : ' There must be actual violence of such a character as to endanger personal health or safety ; or there must be a reasonable apprehension of it.' ' The Court,' as Lord Stowell said in *Evans, vs. Evans* ' has never been driven off this ground.' " The recent case, to which the Privy Council refer, was no doubt the case of *Milford vs. Milford*. A number of earlier cases have been quoted to us as showing that to constitute legal cruelty, it is not necessary that there should be actual violence ; and, no doubt, some of those cases do indicate a desire on the part of the English Judges to enlarge the definition of cruelty, so as to embrace certain cases of peculiar hardship. But the authority of the later cases is conclusive as to the present state of the English law. In *Milford vs. Milford* the Judge Ordinary took time to consider his judgment, observing :—" The question of cruelty, requires a very critical examination. It is just one of those cases in which the Court is bound to take care that it is not induced, by the desire of giving full relief to the wife, to trespass beyond the limits assigned by the law to the definition of legal cruelty." And afterwards, in delivering judgment, he said :—" The essential features of cruelty are familiar. There must be actual violence of such a character as to endanger personal health or safety, or there must be the reasonable apprehension of it. The Court, as Lord Stowell once said, has never been driven off this ground. Nor to the cases cited in the argument, whatever general expressions may have fallen from

the Court, affect to decide that any thing short of this will be sufficient to found a decree upon cruelty. The ground of the Court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread." In the still more recent case of *Kelly vs. Kelly* the Judges stated the law in similar terms, and granted a judicial separation on the ground that, if force, whether physical or moral, is systematically exerted to compel the submission of a wife to such a degree and during such a length of time as to injure her health, and render a serious malady imminent, although there be no actual physical violence such as would justify a decree, it amounts to legal cruelty. In that case, then, the Judges were careful to keep within the limits laid down in previous cases. The question for us to decide is whether, in this country, we ought to extend those limits, and to enlarge the definition of legal cruelty so as to allow a wife to justify her desertion of her husband upon grounds which in England would not amount to a justification. After a careful consideration of this question we have come to the conclusion that we ought not to do so. Native law and custom is, at least, as stringent as English law in regard to the duty of a wife to live with her husband. As the Judicial Committee say of the Mahomedan law, so we would say of the Hindu law, that, on a question of what is legal cruelty between man and wife, it would probably not differ materially from our own. Any difference there might be, would be in the direction of greater strictness, not of greater laxity,—at least in regard to the treatment of the wife by the husband. A Hindu wife cannot, any more than an English wife, claim a divorce on account of merely her husband's inconstancy; but she may demand a separate maintenance if her husband ill-treat her on account of a favourite wife or mistress. She may abandon a husband who communicates anything noxious. In the case of any undue chastisement, in the exercise of marital rights, our Courts would probably adopt the views expressed by Sir Thomas Strange, though in the Presidency towns they might possibly be somewhat hampered by the provisions of 21, Geo. III, C. 70, S. 18, and 37, Geo. III., C. 142, S. 12. But we do not think that we should be justified under Hindu law, any more than under English law, in holding that an unfounded imputation upon a wife's chastity, however gross an outrage, is by itself sufficient to constitute legal cruelty. An American writer refers to an old case in Scotland where a husband publicly and perseveringly reproached his wife falsely with lascivious behaviour and immoderate lust, and in which the Commissaries of the Court of Ses-

sion held this a sufficient ground for a judicial separation ; but the House of Lords reversed the decision. The observations of this writer on this subject are worth quoting. " The proposition," he says, " seems to be, on the whole, well established in England and in most of our States, that the harm to be apprehended must be bodily harm, in distinction from mental suffering. For, while it is admitted that pain of mind may be even more severe than bodily pain, and a husband disposed to evil may create more misery in a sensitive and affectionate wife by a course of conduct addressed only to the mind, than if, in fits of anger, he were to inflict occasional blows upon her person ; still it is said that in such a case ' the Court has no scale of sensibilities by which it can gauge the quantum of injury done and felt.' The rule, therefore, seems to have arisen, not from any notion of its inherent justice, but from the difficulty of practically administering the opposite rule, of regarding the mind the same as the body." In this country generally, and particularly in the present case, in which imputations of lascivious behaviour are cast by both sides with equal recklessness, it would certainly be impossible to gauge by any scale of sensibilities the quantum of injury done and felt.

As to the statement of his intentions contained in the plaintiff's deposition before the Magistrate, to which reference has been made, it is sufficient to say that, even if it be regarded as a menace seriously intended, it falls short of a justification of the first defendant's refusal to return to her husband.

It follows that the first defendant has not, in our opinion, proved legal cruelty on the part of her husband or his relations. In a suit between Hindus we consider that the only safe and practical criterion of cruelty is that contained in the definition which guides the English Courts, namely, that there must be actual violence of such a character as to endanger personal health or safety ; or there must be the reasonable apprehension of it. In a suit between Muhammadans the Privy Council has expressed its opinion that the same definition is applicable ; and in the Parsi Chief Matrimonial Court of Bombay, over which I now preside, a similar definition was adopted at an early period of the Court's existence (*Pardunji vs. Kursetji Dinbai*, 23rd November 1869.)

The next question is whether the plaintiff, having established his right to compel his wife to return to his protection, is entitled also to a decree against the second defendant, Narayan Bhide. The law on this subject is correctly stated by the Assistant Judge. Every person who receives a married woman into his house, and suffers her to continue

there after he has received notice from the husband not to harbour her, is liable to an action for damages, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has, by some insult or ill-treatment, compelled her to leave him. The present plaintiff asks, not for damages, but for an injunction; and he is entitled to an injunction if he has proved his case, and if the conduct of the second defendant still continues to show a necessity for it. The Assistant Judge has found that the second defendant did harbour the first defendant after notice from her husband; and, looking to the conduct of the second defendant throughout the proceedings in the suit, we cannot entertain any doubt that he has been, and is, actively, aiding and abetting the first defendant in her opposition to her husband's wishes.

Our decree must be that the plaintiff is entitled to his conjugal rights, and that the first defendant, Yamunabai, be ordered to return to his protection, and that the second defendant, Narayan Bhide, do abstain from harbouring the first defendant, and from offering any obstruction to the return of the first defendant to her husband's protection.

Having regard to the conduct of the parties, and to all the circumstances of the case, we think that each party should bear his and her costs throughout.

We amend the decree of the Court below accordingly.

SHORT NOTES.

PRIVY COUNCIL.

Hindu Law—Mitakshara—Undivided Share of Joint Family Property—Succession—Decree in Suit against Widow—Limitation—Act VIII. of 1859, s. 246—Disability under ss. 11 and 12, Act XIV. of 1859—Misjoinder—Questions of Law referred to a Full Bench.

The limitation of one year, provided by s. 246 of Act VIII. 1859, is subject, in the case of a minor, to be modified by ss. 11 and 12 of Act XIV. of 1859. The benefit of these latter sections is not limited to the period when the disability of minority has ceased, but applies also to the period during which the disability continues; and therefore, during the latter period, it is open to the minor to sue by his guardian.

On the death without issue of a member of a Hindu family joint in estate and subject to the Mitakshara law, his undivided share in the joint family property passes to the surviving members of the joint family and not to his widows, and cannot be made liable for his debts under decrees obtained against his widows as his representatives.*

Quære, where a member of a joint Hindu family[†] governed by the Mitakshara law, without the consent of his co-sharers, and in order to raise money on his own account, and not for the benefit of the joint family, mortgages in his life-time his undivided share in a portion of the joint family property, can the other members of the joint family, on his death, recover from the mortgagee the mortgaged share, or any portion of it, without redeeming?

A suit by a surviving member of a joint Hindu family subject to the Mitakshara law, to recover a moiety of the undivided share of a deceased member of the family in the joint family property, ought not to be dismissed on the ground that all the members of the family have not joined in bringing the suit, where it appears that the only other surviving member of the family has already sued for and recovered his moiety of the property, and disclaims all further interest, and is joined as a co-defendant in the suit.

Where a Division Bench of a High Court refers a question of law for the consideration of the Full Bench, and the answer of the Full Bench is not framed as a decree or as an interlocutory order, and an appeal is brought to Her Majesty in Council, it is open to the respondent, without a cross-appeal, to object to the correctness of the answer given by the Full Bench on the question of law referred.

Vide 1, Indian Law Reports, Calcutta Series, p. 226, (Appeal from Calcutta High Court). The 15th and 16th December 1875, and 1st February 1876—Phoolbas Koonwar *vs.* Lalla Jogeshur Sahoy.

CALCUTTA HIGH COURT.

Criminal Procedure Code (Act X. of 1872), s. 64—Power of Judge acting in English Department.

An application for the transfer of a case under s. 64 of the Criminal Procedure Code should be made, not by letter to the English Department of the High Court, but before the Court in its judicial capacity, and should be supported by affidavits or affirmation in the usual way.

Vide 1, Indian Law Reports, Calcutta Series, p. 219, (Full Bench). The 23rd March 1876—The Queen *vs.* Zuhiruddin and others.

BOMBAY HIGH COURT.

Practice—Account—Commissioner's Report—Motion to discharge or vary—Affidavit—Memorandum of objections—Decree—Construction—Notes of judgment in Deputy Registrar's Book.

In moving to discharge or vary the report of the Commissioner for taking accounts, the right practice is to move on a memorandum of objections filed in the Prothonotary's Office, and upon the evidence taken by, and the proceedings before, the Commissioner, and not on affidavits made for the purpose of the motion. In such a motion, affidavits should only be filed (a) when ordered by the Court, if it desire fresh evidence; or (b) by special leave of the Court for the purpose of advancing a fact which does not appear on the face of the proceedings before the Commissioner.

A note of the judgment of the Court taken by a Deputy Registrar cannot be consulted for the purpose of explaining or aiding in the construction of a decree. Where, therefore, a decree was, on the face of it, an ordinary decree in a partnership suit, for the taking of the accounts between the partners in the usual way, the Court refused to allow the respondent to show, by reference to such a note, that what the decree meant was that he was to be credited and his partners debited with certain payments *in toto*, and not with their respective shares only.

Vide 1, Indian Law Reports, Bombay Series, p. 158, (Westropp, C. J., and Green, J.) The 4th March 1876. Sumar Ahmed and others *vs.* Haji Ismail and Haji Habib.

Award of Compensation—The Code of Criminal Procedure (Act X. of 1872), Section 209—Complainant.

A *karkun* on the establishment of a Civil Court, entrusted with the execution of a writ, reported to the Court that a particular person obstructed him in attaching property as commanded by the writ; and a report was thereupon made by the Court to a Magistrate, with a view to proceedings being taken against the obstructor. The Magistrate acquitted the accused and ordered the *karkun* to pay the accused compensation under Section 209 of the Criminal Procedure Code.

Held that such last-mentioned order was wrong, the *karkun* not being a complainant within the meaning of Section 209 of the Code of Criminal Procedure. In such a case as the above the Subordinate Judge should be regarded as the complainant, and he, having acted judicially,

was not liable to the penalty provided in Section 209 of the Criminal Procedure Code.

Vide 1, Indian Law Reports, Bombay Series, p. 175. (Melvill and West, J.J.) The 23rd March 1876. In re Keshav Lakshman.

BOMBAY HIGH COURT.

The 16th March, 1875.

PRESENT :

Mr. Justice Kemball and Mr. Justice Nanabhai Haridas.

LAKSHMAN RAMCHANDRA* and others (Defendants) *Appellants*,

versus

SARASVATIBAI (Plaintiff) *Respondent*.

Maintenance—Ancestral property—Hindu law—Purchaser bonâ fide and for value.

The maintenance of a Hindu widow is not a charge on any ancestral property in the hands of a *bonâ fide* purchaser from her late husband's successors any more than the payment of unsecured debts due by the family.

The proposition in *Ramchurun Tewaree v. Mussamat Jasooda Koonwer* (2, Agra, 134) that the liability of family property, in the hands of a purchaser, for the maintenance of a widow, depends on the ability of her husband's heir to support her, dissented from.

NANABHAI HARIDAS, J. :—The respondent, Sarasvatibai, a Hindu widow, sued her nephew, Mahadev Narayan (not before the Court now), and the two appellants to recover from them Rs. 48 as her maintenance for 1869-70, and to have the same declared a charge, during her life-time, upon certain ancestral property in the hands of the appellants.

The appellants are *bonâ fide* purchasers of that property for valuable consideration, and the only ground on which it is sought to charge them with the maintenance is that they are now in possession of property, which, if it had remained undisposed of in the hands of her nephew, would have been liable for such maintenance.

The plaintiff's husband, according to her own statement, appears to have died about forty years ago, during the life-time of his father. When the plaintiff's father-in-law died does not appear, nor is there anything to show when her brother-in-law, Narayan, died. But it seems that the property of the family, after their death, came into the possession of their sole heir, Mahadev Narayan, her nephew. It

* *Vide* 12, Bom. H. C. Rep., p. 69.

further seems that Mahadev sold a portion of it about seven years ago to the first appellant, who again sold a portion thereof to the second appellant.

What the occasion for the sale to the first appellant was has not been ascertained by the court below, though it appears from the Subordinate Judge's judgment, that the sale was made to pay off "debts," which Mahadev Narayan alleged to have been "contracted for family purposes." Whether such was really the case or not, there is no ground whatever for purposing that it was other than a *bonâ fide* sale for valuable consideration.

Mahadev Narayan, among other defences, which it is not necessary now to refer to, contended that as in a former suit the plaintiff was declared entitled only to Rs. 12, she could not in this suit claim more.

The other defendants, the appellants before us, contended that they were not liable at all, as they were *bonâ fide* purchasers for valuable consideration.

The Subordinate Judge of Alibag, and the Assistant Judge in appeal, awarded the plaintiff's claim with costs, declaring her entitled, during her life-time, to receive annually Rs. 12 from her nephew, and Rs. 36 from the proceeds of the property in the possession of the appellants, *i. e.*, Rs. 18 from each of them.

The question which we have, therefore, to decide in this special appeal is whether, under the above circumstances, the property in the possession of the appellants is at all liable to be charged with the plaintiff's maintenance. This must evidently depend upon what rights Mahadev Narayan and the plaintiff Sarasvatibai respectively had in the property before the sale of it by the former to the first appellant. If the vendor was absolute owner, it is clear the sale conveyed absolute ownership of the property to the vendee, the first appellant. But if that was not the case, it is equally clear that by the sale such right only passed the vendee as was possessed by the vendor.

Upon the findings recorded by the lower courts, we must take it that the property in question was the ancestral property of Sarasvatibai's father-in-law; and such being the case, we must also take it that her husband had, from the time of his birth, a right in that property equal to his father's, which continued to his death, some forty years ago. In virtue of this right, he might have obtained a partition of that property from his father and other co-parceners, in which case, upon his death, Sarasvatibai would have succeeded to his share of it. But he died un-

divided, and, according to the Hindu law applicable to such cases on this side of India, the property vested in those co-parceners, of whom Mahadev Narayan is now the sole survivor. While in his possession as such, he sold it to the first appellant. Unless, therefore, at the time of the sale, she had an interest in the property in the nature of a charge upon it, it would be difficult to hold that it did not pass absolutely to him.

It is contended for the respondent that she had such interest; that her maintenance was a "charge" on the ancestral property; and that, therefore, those who have purchased it, have done so subject to such "charge." In support of this contention, Mr. Bhairavnath has cited to us several authorities, which we shall now examine to see if they establish the proposition contended for.

In *Shidapa v. Parsya* (S. A. 433 of 1871), decided on the 18th December 1872, by Sir Charles Sargent and Mr. Justice Melvill, their Lordships had not to decide the question raised here, and they did not decide it. From the judgment recorded in the case, it would appear to have been a suit by a Hindu widow to eject a purchaser of some family property, and her claim was disallowed, their Lordships observing: "The plaintiff can, if so advised, bring another action for maintenance, but in the present suit, as she has failed to establish her claim to the property, we must reverse the decree of the court below, and disallow the claim." In that case, if they have expressed any opinion at all on the subject, it is one which rather doubts the soundness of the proposition now contended for since they remark: "In the present case, the defendant is a stranger, and the property, in respect of which the action is brought, would be liable (*if liable at all*) only under certain circumstances, the existence or non-existence of which cannot be ascertained without raising issues foreign to the contention between the parties, &c."

In the case of *Mussamat Golab Koonver and others v. The Collector of Benares and another* there was no question, as in this case, between a widow and a *bonâ fide* purchaser for value of ancestral property, and it cannot, therefore, be said to have decided the point now raised. It was a case of confiscation by Government under Bengal Regulation XI. of 1796 of the whole property of a joint Hindu family, consisting of the widow and four sons of the last owner, for an offence of which three only of those sons were guilty, the fourth being a minor, and their Lordships of the Privy Council held that the confiscation did not affect the right of the fourth son, or of the widow to her maintenance out of the whole of the ancestral estate. They virtually declared liable to con-

fiscation by Government such portion only of the whole estate as, upon a partition, would have fallen to the share of those three sons; and the widow's right to maintenance would appear to have been tacitly conceded by Government, for the judgment says (p. 258) : " Nothing was urged at the bar against this right."

In *Mussumat Khukroo Misrain v. Jhoomuck Lall Dass* (a), the question now raised did not properly arise between the parties, and though there is in the judgment a *dictum* to the effect that the widow " could make the estate chargeable with it into whose hands soever it had fallen under the foreclosure," no authorities are cited in support of the position, and it rather assumes that her claim for maintenance is in the nature of a " lien" on the estate. Besides, this dictum has reference to the contention in argument that as the widow's claim for maintenance was a charge on the estate, therefore she had an interest in keeping the estate in the family; and, moreover, the estate was only declared to be chargeable, if the widow failed in getting her maintenance from the members of her late husband's family.

The case of *Ramchandra Dikshit v. Savitribai*, principally relied upon by the Subordinate Judge, and strongly pressed upon our attention by Mr. Bhairavnath, though it might at first sight seem to do so, when it lays down that " By Hindu law the maintenance of a widow is a charge upon the whole estate, and, therefore, upon every part thereof," does not in reality determine the question now before us. Whether her maintenance is such " a charge" or not was not the point the Court was called upon to decide in that case, and we have the authority of the learned Judge himself, whose judgment contains those words, for saying that it did not decide that point; for, when in a later case, the case of *Ramchandra Dikshit v. Savitribai*, was cited before him in argument as deciding that " the maintenance of a Hindu widow is a charge," &c., he observed: " The question there was as to whether one brother could be sued alone, and it was held, that he could."

The case of *Skrimati Bhagabati Dasi v. Kanailal Mitter* (b) cited by Mr. Bhairavnath in support of his proposition, is in reality more against than for his client. It decides (1st) that " as against one who takes as heir, a Hindu widow has a right to maintenance out of the property in his hands," which, no doubt, is as good law in this Presidency as it is in Bengal, but which does not apply to the present case; (2ndly) that she also has a right to maintenance out of such property in the hands of

any one who takes it with notice of her having set up a claim for maintenance against the heir"—as to the application of which to this case it is sufficient to say that it has never been contended that any such claim had been set up by the plaintiff, or that the appellants had any notice of it when they purchased the property sought to be charged; and (3rdly) that "by the law of Bengal she has no lien on the property for her maintenance against all the world irrespective of such notice."

The case of *Prosonno Coomarsein Mozoomdar v. The Revd. B. F. X. Barbosa* (a) does not seem to us to apply to the present case. There "a charge" in the strict sense of the term having been created by will upon an entire estate in favour of the respondent, and a portion of such estate having come into the appellant's possession as purchaser, it was held that the person in whose favour the charge was created was at liberty to proceed against the party in possession of any part of the estate subject to the charge, having such party to recoup himself by contribution from his co-sharers. To apply this decision to the present case, one must assume the very point that is sought to be established, namely, that a Hindu widow's claim to maintenance is "a charge" upon the estate.

The learned authors of the Digest of Hindu Law certainly seem inclined to think that it is such a charge, and that any family property in the hands of a purchaser should, therefore, be regarded as subject to it; but they do not support their opinion by any reasoning or texts or decided cases, to enable one to determine whether it is well founded.

We last come to the cases of *Heera Lall v. Mussumat Kousillah* and *Ram Churun Tewaree v. Mussumat Jasooda Koonwer* also relied upon for the respondent.

In the first of these cases the facts are not fully set out in the report; but sufficient appears in it to enable one to guess with tolerable certainty what they were. It would seem that the amount of the widow's maintenance had been fixed at "four rupees per month," which must have been done either by a family arrangement or by a decree of the Court; that express mention was made of it in the sale deed, which also stipulated that that sum should be paid by the vendor—circumstances pointing to the inference that the parties were dealing with each other upon the basis of that maintenance being actually charged on the property, and that the vendee was anxious to free it from the charge, that the widow was no party to the deed; and that from the moment she came to know of it, she "vigorously opposed the mutation of names."

(a) 8 Calc. W. R. Civ. Rul., 253.

If such were the facts, the general question "whether the widow has an actual lien on the property of her deceased husband, or only a right of action against the heir personally, who takes the property," was by no means necessary to the determination of the case, and the court's answer to it, that "the widow's right is a charge on the property which formed the estate of her husband," stands upon no higher footing than a *dictum*. But if we have not rightly conjectured the facts, the case is certainly a direct authority in support of Mr. Bhairavnath's contention, though it is not very clear why the court, holding as it did, and dismissing the purchaser's appeal, should have ordered that "the decree should be executed first against the heir Madho Singh" (who was not a party to the appeal) "and if he fails to pay it, then against the other defendant," the purchaser. If the widow's right was "a charge," why was she not to be at liberty to realize it out of such property in the first instance, she preferring so to do?

In the other case of *Ram Churun Tewaree v. Mussumat Jasooda Koonwer* the doctrine of the widow's maintenance being "a charge" on the estate was sought, but in vain, to be carried to its logical consequence. The respondent, under Section 348 of the Civil Procedure Code, objected that "she should be permitted to enforce her claim against the property purchased by the appellant in the first instance, and not, as the Principal Sadar Amin had decided, after unsuccessfully endeavouring to enforce it" against her husband's heirs and their property. The objection, however, was disallowed, although it had been held that the appellant had purchased the property in execution of a decree in his own favour which the heirs, in collusion with him, had allowed to pass against themselves. This case lays down that property in the hands even of a collusive purchaser is not liable, except under certain circumstances; and that the widow should proceed in the first instance against the heirs and their property. According to this decision, whether a widow's maintenance in a given case is or is not a charge upon family property in the hands of a purchaser, must depend upon whether her husband's heirs are or are not able to support her—a proposition which appears to us to be unsupported by reason or authority. If her maintenance is really "a charge" upon the alienated property, it is not easy to perceive how it can cease to be so by the fact of the heirs having property which may be their own acquisition, nor, if at the time of the alienation the property does not pass to the alienee burdened with any such charge, how one can well be imposed upon it

subsequently, merely because the heirs happen at the time to have no property, which may be the result of their own improvidence.

These authorities, then, do not seem to us to establish that the maintenance of a Hindu widow is a charge on any such property in the hands of a *bonâ fide* purchaser from her late husband's successors, and one of them at all events is certainly an authority the other way. (a)

The texts, which relate to maintenance, occurring in the principal works of authority on this side of India, lay down generally that he who inherits a person's property is bound to maintain those whom that person was himself bound to maintain. But it will be seen, that similar texts also enjoin upon him "the payment of debts" "the initiation of the uninitiated as well as "the marriage of the unmarried members of the family", and the performance of certain ceremonies for the spiritual benefit of that person, and all these are, in English works on Hindu law, spoken of as "charges on the inheritance" no less than the maintenance of the dependent members of his family. If the latter, therefore, is "a charge" on the inheritance, it is so in no other sense than that in which the former are so.

Now it has been held both in Bengal and here that a creditor cannot follow the assets of a deceased Hindu into the hands of a *bonâ fide* purchaser for valuable consideration. See *Sunbassapa v. Moodkapa*, *Naroo Huree v. Konheir-Munohur*, *Jamiyatram Ramchandra v. Parbhudas Hathi*, and *Unnopoorana Dassia v. Gunga Narain Paul*. (b)

It is indeed laid down in a work of great authority that "debts follow the assets into whosoever hands they come", but, as observed by Westropp, C. J., in *Jamiyatram Ramchundra v. Parbhudas Hathi*, the proposition is "too broadly stated," and is not warranted by the authorities upon which it is based.

If, then, property in the hands of a *bonâ fide* purchaser cannot be pursued by a creditor of the deceased proprietor, it is difficult to see how the case of a widow, whom he was legally bound to maintain, no less than he was to pay his debts, is to be distinguished. What is there to render such property liable in the one case and not in the other?

Moreover, it is difficult to understand when this "charge on the inheritance" is said to attach to the family property. The duty of maintaining a female legally rests with her husband from the moment of her marriage. No distinction is drawn in the Shastras between wives and widows; if, then, her right to maintenance becomes a charge from

(a) 8, Beng. L. R., 225.

(b) 2, Calc. W. R. Civ. Rul. 296.

the moment of marriage, every alienation made subsequently is subject to such burden—a liability capable of being enforced at any time when the wife or the widow is unable to obtain maintenance from her relatives.

We must, therefore, reverse the decrees of the lower courts so far as they affect the special appellants, or the property in their hands as purchasers. The sum of Rs. 12, which the plaintiff will receive under those decrees from her nephew Mahadev Narayan may not be sufficient for her maintenance; but, inasmuch as she has chosen not to appeal against them, and inasmuch as he, Mahadev Narayan, is not before us, we are unable to inquire into, or order any inquiry into, the sufficiency or suitableness of that allowance; and as the special appellants were improperly made parties to this suit, we think they are entitled to their costs throughout.

BOMBAY HIGH COURT.

The 17th November, 1873.

PRESENT :

Mr. Justice Westropp, *Chief Justice*, and Mr. Justice Pinhey.

GULABCHAND MANIKCHAND* (*Appellant*),

versus

DHONDI VALAD BILAU (*Respondent*.)

Mortgage—Pendente lite.

The rule *pendente lite nihil innovatur* is in force in British India.

Therefore, where the owner of a house, during the pendency of a suit by an unregistered mortgagee for foreclosure and sale, mortgaged the same house by a registered mortgage to another person, it was held that the last mentioned mortgagee had no title as against the purchaser under a decree for sale in the suit, although such purchaser was the plaintiff in the suit.

A grantee or vendee of the defendant, becoming such during the pendency of the suit, need not to be made a party to the suit, and, inasmuch as the first above-mentioned rule does not rest upon the equitable doctrines as to notice, it is a matter of indifference whether or not, at the time of his becoming grantee or vendee, he had actual notice of the existence of the suit.

WESTROPP, C. J. :—In this case, Sakhu, the widow of Tukaram, and Dhondhu, the son of Tukaram, by deed, dated the 10th November 1866, mortgaged a house, for Rs 15, to Gulabchand Manikchand, the defendant in this suit and present special appellant, who instituted, on the 8th July 1869, against those mortgagors and a third party, a suit for

* *Vide* 11, Bom. H. C. Rep., p. 64.

the enforcement of his mortgage, which instrument has never been registered. On the 26th of October 1869, he obtained a decree for the amount due to him, viz., Rs. 30, principal and interest, and Rs. 11 costs, and that decree contained a direction that the house, the subject of the mortgage, should, in default of payment by the mortgagors of the amount decreed, be sold in satisfaction of the sum so found due on the mortgage for principal, interest, and costs. That amount not having been paid, the house was, on the 25th July 1870, sold by the Court, in pursuance of the decree, to Gulabchand Manikchand, who himself became the purchaser, and it is admitted that, as such, he was then put into possession of the house. The present plaintiff and respondent, Dhondi valad Bhau Patil, claims under Exhibit No. 3, which is a mortgage of the same house to him for the sum of Rs. 251, executed by Sakhu and Dhondu Tukaram, on the 26th of July 1869, and registered on the same day. It is admitted that the consideration for that mortgage consisted of an unregistered mortgage bond, dated 3rd May 1868, of the same house for the sum of Rs. 99 (Exhibit 25), and of two ordinary money bonds of the same date, which, in the aggregate, together with the mortgage bond for Rs. 99, amounted to Rs. 216. That sum together with interest amounted to Rs. 251, then said to be due, and it is admitted that no fresh advance or new consideration was given for the registered mortgage bond of the 26th July 1869.

Under these circumstances, the present plaintiff, Dhondi valad Bhau Patil, instituted this suit against Sakhu, Dhondu, and Gulabchand to recover the amount of the registered mortgage (Exhibit No. 3), or to be put into possession of the house.

The defendant, Gulabchand, relied on the priority of his unregistered mortgage of the 10th November 1866, on the decree made in the suit which was instituted by him on that mortgage before the execution of the registered mortgage to the plaintiff, and on his purchase under that decree.

The Subordinate Judge and the Assistant Judge have respectively decreed in favour of the plaintiff; the Assistant Judge saying that both defendant Gulabchand's unregistered mortgage of 1866 and plaintiff's registered mortgage of 1869 were without possession, and that, as regarded the plaintiff's mortgage, its registration cured that defect.

The defendant, Gulabchand, has made a special appeal to this Court, and we do not think that the right view of this case has been taken in the Courts below. Those Courts do not seem to have had suffi-

cient regard to the circumstance that the registered mortgage, on which the plaintiff relies, was executed subsequently to the institution of the suit of Gulabchand, or to have attended to the rule, which prevails as well at law as in equity, as to transactions entered into during the pendency of litigation, or to the kindred provisions of Sec. 223 of the Civil Procedure Code. The plaintiff could not, as against Gulabchand, rely on the unregistered mortgage of the 3rd May 1868 to him, inasmuch as it was puisne in date to the unregistered mortgage of the 10th November 1866 to Gulabchand, and, as to registration, stood in no better position.

The plaintiff's registered mortgage of the 26th July 1869, was executed during the pendency of Gulabchand's suit against the mortgagors, which commenced upon the 8th July 1869, and must, therefore, whether the plaintiff did or did not give valuable consideration for that mortgage, and whether he had or had not, at the time of the execution of that mortgage, any knowledge of the existence of Gulabchand's suit, be regarded as subject to the decree which might be pronounced in that suit. This is so as well in England as in India.

The rule is *pendente lite nihil innovetur*. It is a rule which does not rest on the equitable doctrine as to notice, although in some of the authorities it has been rested upon that doctrine. The better opinion is that it rests upon the inability of the defendant to give, as against the plaintiff, a title during the existence of a suit brought to enforce a specific lien against or purchase of the property. Sir Thomas Plumer, M. R., in *Metcalfe v. Pulvertoft* said that "the true interpretation of this rule is, that the conveyance does not vary the rights of the parties in the suit; that it gives no better right, having no effect with reference to any beneficial result against the plaintiff in that suit; and it is very reasonable that the litigating parties should be exempted from the necessity of taking notice of a title, acquired under such circumstances. With regard to them it is as if it had never existed: otherwise suits would be interminable; if one party pending the suit could by conveying to others create a necessity for introducing new parties. The voluntary act, therefore, of the defendant conveying to another, cannot vary the situation or affect the right of the plaintiff." The same views were still more forcibly inculcated in *Bellamy v. Sabine* by Lord Cranworth and Lord Justice Turner. In England the rule has, of late, been narrowed by the Stat. 2 Vic., C. 11, which enacts that a *lis pendens*, unless duly registered, shall not affect a purchaser without express no-

tice. There is not any similar enactment in British India. The rule, as it existed in England before the Statute, 2 Vic., C. 11, prevails here: *Kasim Shaw v. Unnodapersaud Chatterji* and 7, Calc. W. R., 225, Civ. Rul.; Calc. W. R. Special Number for 1864, F. B., 40; 7, Mad. H. C. Rep., 104. Sec. 223 of Act VIII. of 1859 is founded upon that rule.

It follows hence that, even upon the assumption that the present plaintiff had given valuable consideration for his mortgage of the 26th July 1869, and that he had not any notice either of the defendant Gulabchand's earlier mortgage of the 10th November 1866, or of his suit of the 8th July 1869 to enforce that mortgage, the defendant Gulabchand's title, as purchaser in that suit, must prevail against, and is paramount to, the plaintiff's title as mortgagee. The registration of the plaintiff's mortgage cannot affect the rule that he, who accepts a special lien or purchases from a defendant *pendente lite*, does so subject to the decree which may be made in the suit which is pending.

But we cannot take so favourable a view of the facts of the plaintiff's case as above assumed. It is admitted that there was not any new consideration given by the plaintiff to Sakhu and Dhondu Tukaram for the registered mortgage of the 26th July 1869, the consideration for which was only the money remaining due, upon the plaintiff's unregistered mortgage of 1868 and the two money bonds, for principal and interest, all of which securities were of later date than that of the unregistered mortgage to Gulabchand. We regard the giving and taking of the registered mortgage as a collusive act on the part of Sakhu, Dhondu Tukaram, and the plaintiff for the purpose of conferring a technical priority upon the plaintiff's claims. We have no doubt that the plaintiff was then well aware of Gulabchand's mortgage and of his suit. The plaintiff will now, we trust, perceive how much a better course it would have been for him to have redeemed the property, as he might have done before the judicial sale to Gulabchand, the prior mortgagee, by payment of the moderate sum of Rs. 41 for principal, interest, and costs, than to have resorted to the illusory and abortive attempt to gain priority over him and so get rid of his claim altogether.

There is a further difficulty in the path of the plaintiff, who has no document on which he has any pretence for relying against Gulabchand except the registered mortgage of the 26th July 1869. It was contended for Gulabchand that the mortgage of 1869, being, on the face of it, for a consideration exceeding Rs. 100, does not fall within Sec. 50 of Act XX. of 1866, which, it is said, provides for the priority only, over

rected that ten of the witnesses who had been examined in the case before him, including Ram Gholam and Gula Mal, should be tried by the Magistrate of the District on a charge of giving false evidence. On receipt of the Judge's order, Mr. Harrison, the Magistrate, transferred the case to Mr. Watts, the Joint Magistrate, who had made the commitment in the grievous hurt case to the Sessions Court. In the course of his investigation for that commitment Jagat Mal had been examined as a witness, and had then, in Mr. Watts' opinion, given false evidence, and Mr. Watts, having represented this state of things to the Magistrate, received sanction for Jagat Mal being included in the proceedings directed by the Judge under s. 193. Mr. Watts having concluded the inquiry committed the whole eleven accused for trial before himself, and convicted Ram Gholam, Gula Mal, and Jagat Mal, and another (deferring judgment as regards the remaining seven). There was an appeal to the Judge, but the result was its dismissal by him.

Ram Gholam, Gula Mal, and Jagat Mal now apply to this Court in revision, urging that Mr. Watts had no jurisdiction to try and convict them, because, according to the terms of s. 471 of the Criminal Procedure Code, he should have sent the case to another competent Magistrate. This, however, is a clearly mistaken view of the law, Mr. Watts being fully competent for all he did. The only case where a Criminal Court cannot itself try is that described in s. 473, which relates exclusively to contempts of Court. Here the charge was not for a contempt, but under s. 193 for false swearing. The conviction and sentence in the case of the three applicants are approved and confirmed, and their application to this Court is refused.

CALCUTTA HIGH COURT.

The 2nd March, 1876.

PRESENT :

Mr. Justice L. S. Jackson and Mr. Justice McDonell.

HURRYMOHUN SHAHA * (Defendant) *Appellant*,

versus

SHONATUN SHAHA (Plaintiff) *Respondent*.

Hindu Law—Inheritance—Stridhan.

With respect to property given to a woman after her marriage by her husband's father's sister's son, the brother, mother, and father are preferable heirs to the husband.

* *Vide* 1, Indian Law, Reports, Calcutta Series v. 275.

JACKSON, J.—The question which we have been called upon to consider in this special appeal is whether the plaintiff has any right to maintain the present suit as the right heir, under the Hindu law, to the property which is claimed in this suit. That property was given to the deceased wife of the plaintiff after their marriage and during the continuance of the marriage state by the husband's father's sister's son. It is admitted that this property was the stridhan of the deceased wife, and that the plaintiff claims it as being preferable heir to such property on her decease. This was a matter objected to by the defendant in his written statement.

* * * * *

I think we are bound to decide the case entirely upon the authority of the Dayabhaga, and if we can satisfy ourselves as to the meaning of the author of the Dayabhaga on this question, it will be unnecessary to go to any inferior authority. But we have the express authority of Jimuta Vahana himself. In Chap. IV., Sec. iii., the question of succession to the separate property of a childless woman is fully discussed, and we find that the author, after propounding the text of Yajnyavalkya in the second verse of that section, goes on, and in the fourth verse, says :—"It is not right to interpret the text as signifying that any property of whatever amount which belongs to a woman married by any of those ceremonies termed Brahma, &c, whether received by her before or after her nuptials, devolves wholly on her husband by her demise ;" he goes on to give reasons for that, and then we find it stated in the 10th verse of the same chapter and the same section ; " But wealth received by a woman after her marriage, from the family of her father, of her mother, or of her husband, goes to her brothers (not to her husband), as Yajnyavalkya declares, that which has been given to her by her kindred, as well as her fee or gratuity, and anything bestowed after marriage, her kinsmen take, if she die without issue : " and after the brother there is no doubt, that, where the husband does not first take, the mother and the father come in between. The husband, therefore, in such a case would not be the heir, if the text applies, until after brother, mother, and father. The question is whether the text applies to this case. It seems to me that it very clearly does. The property in dispute is undoubtedly wealth received by a woman after her marriage, and it was received, not from the family of her father, or of her mother, but from the family of her husband. That the expression " family of her husband," includes the degree of kindred in which the donor of this

property stood to the deceased woman I have no doubt. The question was raised before us to-day whether such a relation could be properly called *sapinda*. It is not necessary that we should decide that point, but we think that the "family of the husband" is a term wide enough to include this kind of relation, and it appears to us that, if the Subordinate Judge, in deciding this appeal, had looked carefully to the very author to whom he does refer, he would have found ample authority so far as the book* itself goes for not coming to the conclusion that he arrives at. He appears to have referred to text 473, which is at page 722 of the second edition of the book; but if he had referred to the preceding texts, 470 and 471, he would have found what we now decide set out very fully, and moreover in the table of succession set out at page 733 we find that the order of succession to property given by the parents before marriage or *bestowed after marriage*, is, first the brother, second the mother, third the father, and fourth the husband. Pages 712 and 720 are here referred to us, showing what was meant by the words "bestowed after marriage," and the explanation is given under the third branch of *vyavastha* 470, which says:—"Wealth received by a woman after her marriage, from the family of her father or mother or of her husband, goes to her brothers." A great deal has been sought to be made of the language of the *Dayakrama Sangraha* and *Dayatatwa* upon this point, but it seems to us that the contention so raised is based entirely upon the very concise language used in some places by the authors of those two books who, when they mean to designate a particular class of persons, use the person who heads the class to designate the whole. We are reminded by Baboo Mohinee Mohun Roy, who argued this case for the appellant, of the careful explanation given of this very matter by my late colleague, Dwarkanath Mitter, J., in the very able judgment which he delivered in the case of *Judoonath Sircar vs. Bussunt Coomar Roy Chowdry*, (11., B. L. R., 286), a judgment to which I was a party, and in which I at the time entirely concurred. For these reasons we think that in this case the plaintiff is not the next heir, and therefore the Subordinate Judge has come to an erroneous decision on the point of Hindu law involved, and that his judgment must be set aside, and the plaintiff's suit dismissed with costs.

I am bound to say that, as far as we have been able to judge, it seems to us that it is a suit which in every way deserves to be dismissed on the merits. I should observe that the contention that the donor of

* *Vyavastha Darpana*.

this property is not a member of the husband's family involves the contention that he was a stranger, and this is contrary to the admitted fact that the property was stridhun.

CALCUTTA HIGH COURT.

The 28th March, 1876.

PRESENT :

Before Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Morris

MOHESH MISTREE* and another, *Petitioners.*

*Criminal Procedure Code (Act X of 1872), ss 294, 295, 296, and 297—
Order of Discharge under s. 215—Revival of Proceedings.*

An order of a District Magistrate, directing the revival of certain criminal proceedings against the petitioners who had been discharged under s. 215 of the Criminal Procedure Code by a Subordinate Magistrate after evidence had been gone into, quashed as illegal and *ultra vires*.

As the case was one of improper discharge and came before the Magistrate under s. 295 of the Criminal Procedure Code, the proper and only course for him was to report it for orders to the High Court, which, if of opinion that the accused were improperly discharged, might, under s. 297, have directed a retrial.

In this case one Gopal Mala charged the petitioners with causing hurt to him. The Magistrate who heard the evidence for the prosecution and called upon the petitioners for their defence, having been relieved in his office by another Magistrate, the latter refused to decide the case on the evidence taken before his predecessor, and heard the case *de novo*, but disbelieving the evidence for the prosecution, discharged the petitioners. The prosecutor, thereupon applied to the District Magistrate, praying for a revival of the case, on the ground that all his witnesses were not examined. The District Magistrate ordered the revival of the case, holding that "as the case was one triable under Chapter XVII. of the Criminal Procedure Code, the order for the discharge of the accused persons should not have been passed without hearing all the witnesses for the prosecution," and being also of opinion that no reference to the High Court was necessary, inasmuch as a discharge under s. 215 was not equivalent to an acquittal, and did not bar a fresh enquiry into the same facts. He accordingly directed the Joint Magistrate to proceed afresh with the case against the petitioners under Chapter XVII. of the Criminal Procedure Code. The petitioners ap-

* Vide 1, Indian Law Reports, Calcutta Series, p. 282.

plied to the High Court to have the order quashed as illegal and made without jurisdiction.

MACPHERSON, J.—It seems to us to be clear that this case came before the Magistrate of the 24-Pergunnas under s. 295 of the Criminal Procedure Code, and that it was in the first instance dealt with by the Magistrate under that section. That being so, his proper and only course was to proceed under s. 296, to report the case for orders to the High Court, which (under s. 297) might have ordered the accused persons to be tried, if of opinion that they had been improperly discharged.

A case (*re Silda bin Satya*) quoted by Mr. Prinsep in his latest edition of the Criminal Procedure Code, as having been decided by the Bombay High Court, has been referred to as showing that the Magistrate was right in the course he adopted. But that case is not reported in the regular reports of the Bombay High Court: nor have we been able to find any report of it. The full facts with which the Bombay Court had to deal are not before us, and we are unable to say how far the Court may really have gone. The note we have of this decision is therefore of little value; and, taking it as it stands, we are not prepared to agree with it as regards cases coming before the Magistrate under s. 295.

Dealing with the matter under ss. 294 and 297, we think there is material error in the Magistrate's proceeding, and that his order, directing the Joint Magistrate to entertain the fresh complaint now made and all the subsequent proceedings, ought to be quashed.

Whatever may have led to the various delays which have occurred in the prosecution of this case since the 21st of July 1875, there is no doubt that every great and unfortunate delay has taken place. It is, as a rule, most unfair and undesirable in every way to order an accused person to be tried over and over again for the same offence, unless under very peculiar circumstances. In the present instance there is nothing peculiar in the circumstances to warrant a third trial: and it seems to us wrong and improper (within the meaning of s. 294) that an order should be made directing the prosecution to be now recommenced.

The order of the 10th of February and all the subsequent proceedings are quashed.

SHORT NOTES.

PRIVY COUNCIL.

Adoption—Suit to set aside—Infant Marriage—Presumption as to Age—Power of Minor to give permission to adopt—Regs X of 1793, s. 33, and XXVI. of 1793, s. 2—Minor under Court of Wards—Onus probandi—Estoppel.

The foundation for infant marriages among Hindus is the religious obligation which is supposed to lie on parents to provide for a daughter, so soon as she is *amanatura viro*, a husband capable of procreating children; the custom being that when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband. The presumption, therefore, is, that the husband, when called upon to receive his wife for permanent co-habitation, had attained the full age of adolescence and also the age which the law fixes as that of discretion.

According to the Hindu law prevalent in Bengal, a lad of the age of fifteen is regarded as having attained the age of discretion, and as competent to adopt, or to give authority to adopt, a son.

Semble.—The operation of s. 33, Reg. X. of 1793, which, read together with s. 2, Reg. XXVI. of 1793, prohibits a landholder under the age of eighteen from making an adoption without the consent of the Court of Wards, is confined to persons who are under the guardianship of the Court of Wards.

Quære, whether a decree in favour of the adoption passed in a suit by a reversioner to set aside an adoption is binding on any reversioner except the plaintiff; and whether a decision in such a suit adverse to the adoption would bind the adopted son as between himself and any other than the plaintiff?

Vide 1, Indian Law Reports, Calcutta Series, 289 — (Appeal from Calcutta High Court.) The 8th, 9th and 10th February 1876—Jumoon Dassya vs. Bamasoonduri Dassya.

CALCUTTA HIGH COURT.

Jurisdiction—Suit for Land— Letters Patent, 1865, Cl. 12—Deed of Trust giving Trustees Power of Sale of Land in the Mofussil—Suit by Creditor to have Trusts carried out.

M and L were the joint absolute owners of certain land in the Mofussil, M having a 14-anna share, and L the remaining 2-anna share therein. During the absence of L in England, M executed, on behalf of himself and L, a deed of assignment of the whole of the property to trustees, for the benefit of the creditors of the estate, which was heavily encumbered, on trust to sell the land and distribute the assets to the creditors. The trustees accepted the trust, but difficulties afterwards arose in carrying them out. A suit was thereupon instituted by the plaintiff, a creditor, on behalf of himself and the other creditors, the plaint in which alleged that the trustees were desirous of being discharged, and prayed that the trusts might be carried into effect; that the trustees might be removed; and that a Receiver might be appointed to carry out the trusts. To this suit the trustees and M and L were made defendants. L, who was in England, denied any power in M to execute the deed on his behalf, the trustees and M were personally subject to the jurisdiction. *Held per* PHEAR, J., in the Court below, that the plaint disclosed a good cause of action, as the Court, if it had jurisdiction, would have power to make a declaration binding against L as to the validity of the deed of trust, to appoint a Receiver of the estate, and to direct a sale which would be binding on M and L; but that the suit being one "for land" within the meaning of clause 12 of the Letters Patent the Court had no jurisdiction to try it.

Held on appeal that the suit, having for its object to compel a sale of the whole of the land, including L's share the title to which was disputed, was a "suit for land" within the meaning of cl. 12 of the Letters Patent, and that the Court had no jurisdiction to try it.

Vide 1, Indian Law Reports, Calcutta Series, p. 249—(Sir Richard Garth, Kt., C. J., and Pontifex, J.) The 29th and 30th March and 2nd May 1876. The Delhi and London Bank, *vs.* Wordie and others.

Damages, Measure of—Action for Breach of Contract—Collateral Contract.

The defendant entered into a contract with the plaintiffs to purchase from them a quantity of gunny bags, of which the defendant was to take delivery at certain stated times. On failure by the defendant

to take delivery, the plaintiffs brought a suit for breach of the contract, estimating the damages at the difference between the contract price and the market prices on the days when the defendant ought to have taken delivery. It was proved that the plaintiffs never had the goods in their possession, but that they could have obtained them under a contract they had with a third person, and it was found that the plaintiffs were ready and willing to deliver them at the time contracted for. The Lower Court held that the measure of damages was the difference between the contract price of the bags, and the amount which it cost the plaintiffs under their collateral contract to procure and deliver them. *Held*, reversing the decision of the Court below, that the proper measure of damages was the difference between the contract price and the market prices at the dates of failure by the defendant to take delivery.

Vide 1, Indian Law Reports, Calcutta Series, p. 264, (Sir Richard Garth, Kt., C. J. and Pontifex, J). The 15th March and 2nd May 1876—Cohen and another *vs.* Cassim Nana.

Criminal Procedure Code (Act X. of 1872), s. 272—Arrest pending Appeal.

In an appeal under s. 272 of Act X. of 1872, the High Court has power to order the accused to be arrested pending the appeal.

Vide 1, Indian Law Reports, Calcutta Series, p. 281, (Macpherson and Morris, JJ.) The Queen *vs.* Gobin Tewari and another.

Husband and Wife—Married Woman's Property Act (III. of 1874), ss. 7 and 8—Succession Act (X. of 1865), s. 4—Action for Trover—Wife against Husband.

The plaintiff was, at the time of her marriage in 1870, possessed in her own right of certain articles of household furniture, given to her by her mother. Since January 1875 she had lived separate from her husband, but the furniture remained in his house. In February 1875, her husband mortgaged the property to B. without the plaintiff's knowledge or consent. In June 1875, one KCB, a creditor, obtained a decree against the husband and B, in execution of which he seized the furniture as the property of the husband, and it remained in Court subject to the seizure. In July 1875, the plaintiff instituted a suit in her own name in trover to recover the articles of furniture or their value from her husband, on the ground that they were her separate property, and in August 1875, she preferred a claim in her own name to the property un-

der s. 88 of Act IX. of 1850. It was found on the facts that the furniture was the property of the plaintiff. The husband and wife were persons subject to the provisions of the Succession Act, s. 4, and the Married Woman's Property Act, 1874.

Held that, under s. 7 of the latter Act, the suit was maintainable against the husband.

Held also, that the judgment for the plaintiff in the suit, to recover the furniture or its value from the husband, could not, without satisfaction, have the effect of vesting the property in the husband from the time of the conversion, and therefore the claim under Act IX. of 1850 was also maintainable.

Vide 1, Indian Law Reports, Calcutta Series, p. 285, (Sir Richard Garth, Kt., Chief Justice, and Pontifex, J.) The 16th May 1876—*Harris vs. Harris*—*Harris vs. Koylas Chunder Bandopadhia*.

BOMBAY HIGH COURT.

Hindu Law—Inheritance—Blindness—Disqualification to inherit.

According to the Hindu law, as prevailing in the Bombay Presidency, blindness, to cause exclusion from inheritance, must be congenital.

Therefore where the widow of a childless intestate, though proved to have been totally blind for some years before the death of her husband, was admitted not to have been born blind.

Held that such blindness did not prevent her from her inheriting the property of her husband on his decease.

Vide 1, Indian Law Reports, Bombay Series, 177 (Westropp, C. J., and Sargent, J.) The 25th March 1876—*Murarji Gokuldas and others vs. Parvatibai*.

Pensions Act XXIII. of 1871—"Toda-Gras"—Decree before the date of the Act.

"*Toda-Gras*" *haks* are within the scope of the Pensions Act XXIII. of 1871; and a suit in respect of them cannot be instituted without the certificate required by Section 6 of the Act.

Where a mortgagee of such *haks* had, before the date on which the Act came into operation, obtained a decree for the recovery of his mortgage debt from the mortgaged *haks* and from the mortgagor personally, and a fresh suit was necessary to enforce execution of that decree against those *haks*,

Held that the Act did not apply to such fresh suit.

Semble that the word "right" in Section 3 of Act XXIII. of 1871 is equivalent to the word *hak* in its restricted sense of "allowance" or "fee."

"*Toda-Gras*" *haks* are thus described by the Judicial Committee of the Privy Council in *Maharana Fatesangji vs Desai Kallianrayaji* (10, Bom. H. C. Rep., 281) : "It is sufficient to state that these annual payments, though originally exacted by the *Grasias* from the village communities in certain territories in the west of India by violence and wrong, and in the nature of black-mail, had, when those territories fell under British rule, acquired by long usage a quasi-legal character as customary annual payments; and that as such they were recognized by the British Government, which took upon itself the payment of such of them as were previously payable by villages paying revenue."

Vide 1, Indian Law Reports, Bombay Series, p. 203. (Melvill and Kamball, JJ.) The 27th March 1876—*Parbhudas Raysaji and another vs. Motiram Kalyandas*.

Miras—Razinama—Abandonment of miras right—Ejectment.

A *Mirasdar* who has given in a *razinama* is entitled to eject the tenant put in possession of his *miras* lands by the Collector, provided he sue within the period of limitation, and the *razinama* contain no stipulation whereby he expressly abandons his *miras* rights.

Vide 1, Indian Law Reports, Bombay Series, p. 208, (Warden and Gibbs, JJ.) The 6th August 1868—*Joti Bhimrav vs. Balu Bin Bapuji and another*.

Registration—Memorandum—Receipt—Section 17 (Clauses 2 and 3) and Section 49 of Act XX. of 1866 and Act. VIII. of 1871—Evidence—Practice—Special Appeal—Point not taken in either of the Lower Courts.

A document purporting to have been passed by a mortgagee to his mortgagor and reciting the demand of the former for re-payment of his mortgage money before the due date of the mortgage, and the compliance with that demand by the latter by means of a fresh loan upon a second mortgage of the same property, and reciting also the fact of the delivery of possession of the property by the original to the second mortgagee; and purporting, in conclusion, to contain a declaration by the original mortgagee that nothing remained due to him in respect of his mortgage, is a document which, under Clauses 2 and 3 of Section 17 of Act XX. of 1866 as well as under Clauses 2 and 3 of Section 17 of

Act VIII. of 1871, requires registration, and, if unregistered, is by Section 49 of the same two Acts inadmissible as evidence of any transaction affecting any property comprised therein.

The fact of the extinction of the original mortgagee's lien may, however, be proved by other documentary or proper oral evidence.

A pain not taken in either of the Lower Courts was disallowed as being too late when taken for the first time at the hearing of the special appeal.

Vide 1, Indian Law Reports, Bombay Series, p. 197, (Westropp, C. J. and West, J.) The 16th March 1876—*Mahadaji vs. Vyankaji Govind*.

Registration Act VIII. of 1871, Section 17, Clauses 2 and 3 ; Section 18, Clause 7—Acknowledgment of receipt of consideration.

J. T. passed a writing to V., under date the 28th April 1874, stipulating that the deed of sale of J. T.'s bungalow to V., for Rs. 4,300, which was to have been made that day, owing to certain circumstances therein mentioned, should be made and delivered by J. T. to V. 20 days thereafter. The writing further acknowledged the receipt, by J. T. from V., of Rs. 100 as earnest money for the purchase of the bungalow, and concluded with certain penalties in the event of a default by either party. In a suit in the nature of a suit for specific performance, brought by V. to compel J. T. to execute the deed of sale to V., and to register the same as promised in the writing of the 28th April 1874,

Held that the writing required registration under Act VIII. of 1871, Section 17, Clauses 2 and 3, as it distinctly acknowledged the receipt of Rs. 100 as part of the consideration for sale of the house to the plaintiff for the sum of Rs 4,300, and operated to create an interest in the house of the value of Rs. 100 and upwards.

Kedarnath Dutt vs. Shumlall Khetry (11, Beng. L., R., 405) distinguished.

Vide 1, Indian Law Reports, Bombay Series, p. 190. (Westropp, C. J., and Melvill, J.) The 2nd February 1876—*Valaji Isaji vs. Thomas*.

HIGH COURT, N. W. P.

Act VIII. of 1859, s. 354—Remand—Objection—Procedure.

Where an Appellate Court, under s. 354, Act VIII. of 1859, refers issues for trial to a lower Court and fixes a time within which, after the

return of the finding, either party to the appeal may file a memorandum of objections to the same, neither party is entitled, without the leave of the Court, to take any objection to the finding, orally or otherwise, after the expiry of the period so fixed without his having filed such memorandum.

Vide 1, Indian Law Reports, Allahabad Series, p. 165. (Full Bench). The 24th April 1876. *Ratan Singh vs. Wazir.*

Hindu Law—Undivided Hindu Family—Ancestral Immoveable Property—Partition.

In an undivided Hindu family the son has, under the Mitakshara, a right to demand in the life-time, and against the will, of his father, the partition and possession of his share in the ancestral immoveable property of the family.

Vide 1, Indian Law Reports, Allahabad Series, p. 159. (Full Bench). The 20th April 1876—*Kali Parshad vs. Ram Charan.*

CALCUTTA HIGH COURT.

The 24th September, 1869.

PRESENT :

Mr Justice Markby and Mr Justice E. Jackson.

THE BANK OF BENGAL* (*Plaintiffs.*)

versus

R. CURRIE AND CO. (*Defendants.*)

Act VIII. of 1859, ss. 41, 97, 272, 327—Act XI. of 1865, s. 38—Act XXI. of 1863, s. 22—Confession of Judgment by Defendant at the time of filing the Plaint—Discretion of Judge to hear the case then and give a Decree.

Held that the Judge has a discretion when parties have come to a mutual agreement, or when the defendant has confessed judgment, to decide the suit at once, in accordance with such agreement or confession. He is not bound to do so till the time fixed for the regular hearing of the suit ; and he cannot exercise that discretion where there is any doubt as to the good faith or identity of the parties.

An insolvent defendant appeared and confessed judgment at the suit of one of his creditors at the filing of the plaint. There were other

* *Vide* 3, B. L. R. (A. C.) p. 396.

suits filed by other creditors. The Judge (Recorder of Moulmein) gave a decision for the plaintiff, but declined to sign judgment, pending a reference to the High Court, and Act XXI. of 1863, Section 22, on the following questions :

(1) Is the plaintiff entitled to a decree as of the date in which the defendant appeared and confessed judgment ?

(2) If he is not so entitled, on what principle are the priorities of the successive plaintiffs to be determined ?

JACKSON, J.—(In delivering judgment said :)—As to the first question, taking the facts of this suit to be that, on the presentation of the plaint, the defendant then and there appeared and confessed judgment, I think that the Judge was not obliged at that time to hear the defendant. The Judge was at liberty to follow the ordinary procedure of the Court, and to order that the hearing of the case should be fixed for a certain date, and to decline to hear the defendant until that date arrived. Even if Section 98 applies, as has been suggested, that section lays down that when the parties are agreed in a suit, the decision of the suit shall be passed in accordance with such agreement, but no time is fixed. Even if the agreement is filed on any day antecedent to that fixed for hearing, the Judge is not bound to consider the suit in any way until the date fixed for hearing. Certainly if the Judge entertains any doubts as to the identity of the parties or their good faith, he should not pass an immediate decree, but should take up the suit on the date fixed for its hearing, and then pass what decree is proper.

On the other hand, it seems to me that every Judge has a discretion where parties have come to a mutual agreement, or where the defendant has confessed judgment, to decide the suit at once in accordance with such agreement or confession. It is, in most cases, for the convenience of the parties, as well as of the Court, that such decrees should be passed without delay. But it is obvious that where there is any doubt of the good faith of the parties or of their identity, the Court would not exercise that discretion, but would allow the case to come on at the regular fixed time. In the case now under reference, the learned Recorder gave the plaintiffs a decree on the date on which the defendants confessed judgment. He had a discretion to do so. The decree was a legal decree, and the plaintiffs are entitled to have it dated on the day on which it was passed.

MARKBY, J.—In this case, I think the first question put to us by the learned Recorder ought to be answered in the affirmative.

I think that the defendants having voluntarily appeared in Court, the necessity of serving a summons for appearance was dispensed with; and that the defendants having further admitted the debt, the Court had no other course than at once to give judgment for the plaintiffs, provided of course that it was satisfied of the identity of the defendants, or that the advocate who appeared for them was duly instructed. I agree with the learned Recorder in thinking that no question of fraudulent preference could then be gone into.

At the same time, I fully concur with the learned Recorder in considering the state of the law most unfortunate, which in the case of an insolvent defendant (the only case in which priority is of any importance) permits the selection by him which of his creditors shall be paid in full, or as is generally the case, which shall be paid at all. Indeed the present procedure is easily capable of being abused still further, and as I believe very frequently is so. In many cases the first in the list of attaching creditors is really only a nominal creditor acting on behalf of the defendant. This is the state of the law all over India and in large commercial communities the evils of such a system are specially apparent.

I may mention however that, in my opinion, if by the practice of the Court there are specific rules as to the order in which cases are to be called on, I do not think the Judge is bound to dispose of a case, either when the plaint is filed or at any subsequent time before it is called on in regular course. I do not think the voluntary appearance of the defendant and his willingness to admit the debt make any difference in this respect; and I have found that strict rules as to the order in which cases, both defended and undefended, are to be heard, of some use in preventing the evils to which the Recorder alludes.

I think we should not be justified in answering the other question put by the Recorder, as the parties between whom it will arise are not before us.

LIENS.

A LIEN may be defined a right which one person has to detain the property of another on account of labour expended on that property, or for the general balance of an account due from the owner.

As the common law imposes on certain trades, as innkeepers and carriers, the obligation of accepting all employment offered within the limits of their occupation, so, in return for this obligation, it entitles the party to a particular lien on the property as a remuneration for the expense and trouble incurred in the execution of the purpose for which such property was entrusted. But the general opinion appears to be, that the right of lien is not confined to those trades which are under an obligation to accept employment from all who offer it; but that the remedy by detention extends to every trade exercised for the benefit and advantage of the community.

Attorneys and solicitors have a lien for their costs on the papers of their clients; bankers, upon all securities in the way of trade; brokers, factors, and agents, on the property of their principals in possession, or even in the hands of purchasers; masters of vessels, on their cargoes, for wages or necessary repairs, during the voyage; carriers have a lien for the carriage price; innkeepers on the goods and property of their guests, for their food and lodging, and on their horses, for their keeping and stabling; insurance brokers have a lien for the general balance of their account on the policies effected by them for their principals; lastly, millers, packers, wharfingers, dyers, coach-makers, calico-printers, and others, have all a lien on the goods respectively confided to them in the way of business.

But as the right of lien is admitted for the benefit of trade, it is confined in its operations to trade only. Therefore no lien lies for the pasture of cattle, or the keep of the dog; or where there has been a special agreement to pay a certain sum for workmanship, in which case the owner of the goods on which the labour has been bestowed can only be made *personally* liable.

A right of lien gives no general right to *sell goods*, except where the detention of goods is creative of expense, when the lien is saleable. In case, too, of the lien on cattle, it is admitted that they may be worked as the owner would have worked them; so also a cow may be milked.

Under the following circumstances the right of lien cannot be exercised:—1. If the possession of property has been obtained wrongfully or by misrepresentation. 2. If it has been entrusted solely on the *personal* credit of the owner of the lien, or delivered by an authorized servant or agent. 3. And lastly, no lien can be acquired over property delivered by a bankrupt, or one in contemplation of bankruptcy. It is also material to remark, that if the holder of goods accept a specific security in lieu, or voluntarily part with the possession of the whole, or part of them, he afterwards loses all right of lien upon them.

Part VI.—REVENUE CIRCULAR ORDERS.

January, 1873.

THE HON'BLE V. H. SCHALCH.

No. 1.

The following is added as Rule 12, Section V., Chapter VI, page 121, Board's Rules—

“Security bonds given on plain paper by ministerial officers are exempted from payment of registration fees.”

No. 2.

The Board have noticed the existence of a common impression among local officers that, when parties interested in land to be taken up under Act X. of 1870 make no demur to the acquisition, or any distinct claim to the additional compensation authorized under Section 42, such acquisition should not be considered compulsory, and therefore no additional compensation should be awarded.

2. The Member in charge desires to impress upon all officers engaged in land acquisition proceedings that it is a presumption of law, and not of fact, that the surrender of land acquired under Act X. of 1870 is compulsory. The additional compensation of 15 per cent. should therefore be paid in all cases, except where under special agreement the parties have accepted a lump sum, and distinctly waived or included therein the claim to any additional compensation under Section 42. In all such cases the agreement must be taken

in writing, and filed with the proceedings.

No. 3.

The following alterations are made in Section VII., Chapter VI., Board's Rules—

Clause 1.—Substitute for this Clause “The Covenanted and Uncovenanted Absentee Regulations are contained in ‘the Civil Leave Code,’ being the Notification of the Government of India, Financial Department, No. 2008, dated the 14th March 1872, with subsequent amendments published under the same authority.”

Clause 5.—For the words “The Government of India have authorised the grant of half-pay to peons,” substitute “Half-pay is allowed to peons,” and strike out from the words “and the Government of Bengal” to the end of the Clause.

Clause 6, para. 1.—For the words “under Section 11.....April 1864,” substitute “Section 3, Supplement F of the Civil Leave Code.”

Clause 6, para. 2.—For the words “under Section 12.....April 1864,” substitute “Sections 5 and 7, Supplement F of the Code.”

Clause 7.—This Clause is cancelled, the form prescribed in it being superseded by that given in Section 15 (b. 1), Supplement F of the Code.

No. 4.

The following is added as para. 17A of the instructions for the administration of Act X. of 1870—

17A.—In all cases referred to the Court under Section 15, the Government Pleader should under Section 23 be instructed to appear and state the cause on the part of Government to the Court.

A. MONEY, Esq., C. B.

No. 5.

It appears desirable that Inspectors of Police should share in the special rewards granted by the Board of Revenue in cases of non-realization of fines imposed under the Excise and Opium Laws. The following alteration is therefore made in the Board's Rules :—

Clause 3 of para. 7 at page 114.

For "Sub-Inspector," substitute "Inspector."

No. 6.

Some officers have represented

that there is a difficulty in giving full effect, at Sub-Divisions and Moon-siffes, to the order contained in the Government Notification of 1st July* last, issued under Section 27 of Act VII. of 1870 (the Court Fees' Act), which rules that, when a single stamp can be used as the exact stamp required to denote a fee, it should be so used,

* *Vide* page 2 of the *Calcutta Gazette*, dated 3rd July 1872.

unless the Collector certifies that no such single stamp is in stock. The Member in charge desires, therefore, that all District Officers will impress on stamp-vendors the necessity of taking for sale a sufficient stock of stamps of the higher values required in suits in Moon-siffs' Courts, and to warn them that, if they do not keep up a proper stock of Court fees' stamps to meet the public demand, it will be necessary to cancel their licenses.

February 1873.

HON'BLE V. H. SCHALCH.

The Towjih Statement is not intended to supersede Return No. X., and need not be employed unless found useful.

No. 1.

As it appears from several communications received in this office that the object of the Towjih Statement, recently circulated, has been misunderstood by several Revenue Officers. Collectors are informed that this statement is not intended to supersede Return No. X., but to facilitate the preparation of it. It need not be employed at all unless it is found useful.

Part VII.—ORDERS AND RULES OF THE HIGH COURT OF CALCUTTA.

CRIMINAL CIRCULAR ORDER, No. 1.

Dated Calcutta, the 3rd January 1873.

All Sessions Judges in the Regulation and Non-Regulation Provinces

Are hereby informed that, in the opinion of the Court, all warrants for sentences exceeding two years should be on paper of a superior quality to that on which warrant forms are now printed. Sessions Judges should therefore indent forms of such warrants in due proportions, and see that the forms are used in the manner above indicated.

High Court,
&c., Criminal
Side.

Present.
The Hon'ble
Louis S. Jackson,
Judge.

2. The form will be supplied separately where there is a stock of forms of the nature prescribed by Circular Order, No. 3, dated 9th February, 1872, and will be printed on the back of new forms of the statement of cases as they are supplied to Small Cause Court Judges.

for the month

87

MARKS

HOU OF S NG.

0-30 to 5 o'clock.

0-30 to 5-15. "

0 A. M. to 5

CIVIL CIRCULAR ORDER, No. 1.

To all Judges of Courts of Small Causes.

Dated the 14th January, 1873.

The Court is pleased to prescribe the form of diary appended hereto, to be attached to the monthly returns of work submitted by Judges of Small Cause Courts. The following instructions should be carefully attended to in its preparation:—

The third column to be filled up for all days of sitting.

When there has been no sitting and the day is not an authorized holiday, the cause of not sitting should be shortly stated. The mode of filling up the diary is exemplified.

Diary of Court of Small Causes of

HOW EMPLOYED

DATE

Sunday

Sat. in Howrah Court

Do. Do.

Gazetted Holiday

Sat. in Serampore Court

Sat. as a Subordinate Judge

1

2

3

4

5

6

CIVIL CIRCULAR ORDER, No. 2.

To all Civil Courts.

Dated the 16th January, 1873.

The attention of all Civil Courts of every grade is drawn to the sub-

under all the circumstances of the case, I think that the woman, Arunja Bewa, will be sufficiently punished with six months' imprisonment with suitable labor.

Mitter, J.—I concur.

THE 20TH FEBRUARY, 1873.

Present :

The Hon'ble Sir Richard Couch, *Kt., Chief Justice*, and the Hon'ble F. A. Glover, *Judge*.

Accused—Deaf and Dumb Person—Understanding Proceedings—Previous Convictions—Committal—Sessions Court—Act X. of 1872, Ss. 186, 297, 315.

Reference to the High Court under Section 296 of the Code of Criminal Procedure by the Officiating Magistrate of Sarun.

DOOBRI HULWAI,

versus

A DUMB PERSON, NAME UNKNOWN.

In the case of an accused person who was deaf and dumb, the Deputy Magistrate who tried and convicted him considered that he did not understand the proceedings and accordingly referred the case to the Magistrate under S. 186 of the Code of Criminal Procedure. The Magistrate considered that the accused did understand what he was charged with. HELD that the finding of the Magistrate must prevail, and S. 186 did not apply.

Acting under S. 297 Code of Criminal Procedure, the High Court annulled the order of the Deputy Magistrate, and, as the accused had been previously convicted of an offence under Ch. XVII. of the Penal Code, punishable with three years' rigorous imprisonment, ordered that he should, under S.

315 of the Procedure Code, be committed for trial to the Sessions Court.

Glover, J.—The Deputy Magistrate sent up this case to the Magistrate under section 186 Code of Criminal Procedure, in order that the High Court might pass such order as seemed proper.

The accused is, as the Deputy Magistrate states, both deaf and dumb, and "is unable to understand the proceedings in the case." The Magistrate, however, says that he is satisfied from the man's demeanour and action that he did understand what he was charged with, *viz.*, house-breaking, and that he, being a very old offender in this particular, ought to have been dealt with under Section 75 Penal Code, and have been committed to the Sessions.

I presume that the Magistrate's finding, as to the accused's being able to understand the nature of the proceedings brought against him, must be taken as conclusive, the Deputy Magistrate's statement notwithstanding, and that Section 186 Code of Criminal Procedure will not apply.

If that be so, the matter would come under the provisions of Section 315 Code of Criminal Procedure, for the accused is stated by the Magistrate to have been no less than seven times previously convicted of an offence under chapter XVII. Penal Code, punishable with three years' rigorous imprisonment, and he should ordinarily

Part III.—SHORT NOTES OF CIVIL RULINGS.

Declaratory Decree—Cause of Action—Right of Suit under Sec. 246 of Act VIII. of 1859—Limitation.

Markby, J. (Bayley J. concurring).—Certainly the words of that section (246 of Act VIII. of 1859) are not very precise, but I take it that, in order to maintain a suit under it, the plaintiff must be prepared to prove two things: first, that the right which he put forward has been investigated and disallowed; and, secondly, that the right which he seeks to have declared is still in existence. It has been held that, if the claim has been investigated and disallowed, the claimant is bound to bring his suit within the year; but that, if the execution is allowed to proceed without the claim having been investigated, the ordinary rule of limitation applies. This is upon the ground that the latter part of Sec. 246 only applies where the claim has been investigated and disallowed; and therefore, unless the plaintiff's claim has been investigated and disallowed, no suit will lie at all under the section, and the plaintiff is left to his ordinary remedy,—that is to say, he may bring a suit when and not until his right has been disturbed. So also, upon a reasonable construction of the words of this section, I do not think the Court could be called upon to investigate the claim, if the claim made and disallowed had ceased to exist.

That might be material if any rights of the plaintiff had been infringed, and the plaintiff were seeking compensation, or to recover possession. * * * I do not think the Legislature can have intended that, apart from any claim for compensation or possession, the time of the Court should be taken up in inquiring into a dispute which, for any present or future purpose, is wholly immaterial.—*IX., B. L. R., Appendix, p. 28. Amjad Ali, 20th February, 1872.*

Declaratory Decree—Sec. 15 of Act VIII. of 1859.

Privy Council.—It was strenuously argued that the suit ought to fail because it is a suit for a mere declaratory decree seeking no consequential relief, *i. e.*, that no such suit would lie unless some consequential relief could be granted as ancillary to it; *Held* that, it must be assumed that there must be cases in which a merely declaratory decree may be made without granting any consequential relief, or in which the party does not actually seek for consequential relief in the particular suit; otherwise the 15th section of the Code of Civil Procedure would have no operation at all. What their Lordships understand to have been decided in India on this article of the Code, and in the Court of Chancery upon the analogous provision of the English statute is that the Court

must see that the declaration of right may be the foundation of relief to be got somewhere. And their Lordships are of opinion that that condition is sufficiently answered in the present case, even if it be assumed that no other consequential relief was in the mind of the party, or was sought by him, than the right to try his claim to enhance in the other forum in which he is now compelled by statute to bring an enhancement suit. It was a necessary preliminary to such a suit that he should establish his right to a share in the zemindary title.—22nd January, 1873. *Sadul Ali Khan, II., L. O., p. 33, XIX., W. R., p. 171.*

Court Fees' Act—Appeal on Valuation.

Section 12 of the Court Fees' Act does not prevent a party from appealing to the High Court under Section 36 Civil Procedure Code, and urging that the Moonsiff was wrong in holding that the case was not governed by the provisions of Article 5, Section 17, Schedule 2 of the Court Fees' Act.—1st March, 1873, *Gunga Moonnee Chowdhrair, W. R., Vol. XIX., C. R., p. 214.*

Special Appeal allowed in a Rent Suit below Rs. 100.—Act VIII. of 1859, Section 73.

When a question is raised as to the amount of the jumma, and such question becomes the subject of a decision, a special appeal will lie under section 102, Act VIII. of

1869, even though the amount of rent claimed is less than Rs. 100.

A suit, brought against a ryot under color of a rent suit, but in reality to have a question of title tried between the plaintiff and another person who has been long in receipt of rent from such ryot, is altogether opposed to the principle laid down in Sec. 73 of Act VIII. of 1859. The decision of XVI., W. R., p. 235, followed.—17th January, 1873. *Ramtonoo Koondoo, Law Observer, Vol. II., p. 39.*

Ejectment—Tenant Rights.

The plaintiff sues to eject the defendant admitting him to be his tenant, but alleging that the term of his kabuleut had expired. The defendant denies the kabuleut and sets up a right of occupancy. The plaintiff failed to prove the kabuleut; and the defendant, his right of occupancy; it was urged that the plaintiff was entitled to recover immediate possession, as the defendant had failed to prove his right of occupancy. *Held*, the plaintiff cannot succeed upon any other ground than that the period of tenancy has elapsed or in some way terminated.—1st March, 1873. *Shaikh Wallah Ali, W. R., Vol. XIX., C. R., p. 215.*

Occupancy Rights—Ryots with a right of occupancy under Section 6 of Act X. of 1839.

When a right of occupancy under section 6, Act X. of 1839, is not set up by a ryot, defendant, the mere

finding as to his having a jote with *occupancy rights*, or his being a tenant with *occupancy rights*, does not bring him within the category of a ryot within the meaning of Act X., having a right of occupancy which cannot be disturbed.—30th January, 1873. *Mohadeb Poddar, Law Observer, Vol. II., p. 42.*

Mohunts—Maths—Succession.

The first and principle question in this suit is, what, if any, is the rule prescribed by the founder of the Math; and if none, what is the custom or usage followed at this Math in regard to the selection and appointment of a successor to a deceased Mohunt. The general principle regulating the devolution of property belonging to a Math, on the death of the Mohunt, is that a virtuous pupil takes the property. In some instances, the Mohuntship descends to a personal heir, and in others, to a successor appointed by the existing Mohunt; but the ordinary rule is that Maths of the same sect in a district, or having a common origin, are associated together, and on the occasion of the death of one Mohunt, the others assemble to elect a successor either out of the disciples of the deceased or from those of another Mohunt.—1st March, 1873. *Gossain Dowlut Geer, W. R., Vol. XIX., C. R., p. 215.*

Inheritance of Widowed Daughters.

Mr. Justice Louis S. Jackson (Glover, J. concurring).—As to the exclusion of Amrita (a widowed

daughter) under the Hindoo Law, there seems to be no ground for that, because although a widow at the time of her father's death, still she could certainly, as the law now stands, remarry and have issue.—24th February, 1873. *Sreemuly Bemola, II., L. O., p. 49.*

Under the Mitákshará a son cannot prevent alienation by his father of property inherited collaterally.

In execution of a decree against A, a Hindu, living under the *Mitákshará*, his right, title, and interest in a certain property, part of which he had acquired as heir to his nephew and cousin, was sold. A suit brought by A's sons to obtain possession of their share of the property, on the ground that the debt for which the sale was held, had not been incurred under a legal necessity, was dismissed so far as it related to the part of the property which A had inherited collaterally. According to the *Mitákshará*, a son cannot prevent alienation by his father of property which the latter has inherited collaterally. The restriction upon the father's power of alienation only applies to the grandfather's property.—X., *B. L. R.*, p. 183. *Baboo Nundo Coomar Lall, Appellant, 16th September, 1872. Act VIII. of 1859, S. 269—Execution Sale—Encumbrances.*

M obtained a decree against J, and in execution attached and sold his lands which were bought by the

decree-holder. The sale was confirmed, and writ of possession directed. After the decree, but prior to attachment, the original judgment-debtor had executed and registered a putnee pottah for a 3 anna share of one of the zemindaries in dispute, and granted it to D, who having objected under section 246 Civil Procedure Code to the above sale, an order was made that at the time of the auction-sale it should be proclaimed that D claimed putnee right. This was accordingly done. Before M was put into actual possession, she was required to find security. Delaying to do this, the lands were attached and sold under a judgment obtained by others who purchased and entered on possession. M having furnished security petitioned to be put in possession; but her petition was rejected. She then brought a suit to cancel the order refusing her possession. In her plaint she claimed khas possession; but did not refer to the putnee claimed by D. Her plaint was decreed, the decree was appealed, and it was finally upheld by the Privy Council; but throughout the litigation no issue was raised as to the putnee. In proceeding to execute the decree, M claimed actual possession. Before process had been issued, D objected to khas possession being given of his putnee mouzah. The Sub-Judge ruled that the objection fell within the spirit of Act VIII, of 1859 S. 269,

Held, that section 269 did not apply, inasmuch as no attempt had been made to deliver possession; but that jurisdiction was not therefore barred;—that the only intention of the decree was to confirm plaintiff in the position which she occupied when the property was sold in execution of her original decree, after proclamation of D's claim, and that she was not entitled to khas possession; and that, if plaintiff wanted a declaration as to the invalidity of the alleged putnee, she ought to have stated her intention unambiguously in her plaint.—5th March, 1873, *Sharodapersand Mullick. W. R., Vol. XIX., C. R., p. 219.*

Hindoo Law—Joint Family—Benamtee Purchase—Act I. of 1845, S. 21.

Property purchased by a member of an undivided family with money belonging exclusively to himself, is his separate acquisition in which the other members are not entitled to share. Property purchased by a member of a joint family with money out of the common estate, is family property, even if purchased in the name of his son. Even if the son is a certified purchaser at a sale under Act I. of 1845, the other members of the family are not debarred by S. 21 from claiming a share of the purchase as joint property.—6th March, 1873, *Bukshie Booniadi Lall. W. R., Vol. XIX., C. R., p. 223.*

Part IV.—INDIA COUNCIL ACTS.

**THE BURMA FERRIES ACT,
1873.**

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ACT NO. II. OF 1873.

**PASSED BY THE GOVERNOR-GENERAL
OF INDIA IN COUNCIL.**

(Received the assent of the Governor-General on the 21st January, 1873).

*An Act for regulating Ferries in
British Burma.*

WHEREAS it is expedient to regulate the public ferries within the Province of British Burma; It is hereby enacted as follows:—

I.—Preliminary.

1. This Act may be called
“The Burma Ferries’ Act, 1873:”

It extends only to the territories under the administration of the Chief Commissioner of British Burma;

And it shall come into force on the passing thereof.

II.—Public Ferries.

2. The Chief Commissioner may declare what ferries within any part of British Burma shall be deemed public ferries, and the district in which, for

the purposes of this Act, they shall be deemed to be situate,

and may at any time hereafter establish new ferries, where, in his opinion, they are needed,

and may, from time to time, change the course of any public ferry,

or discontinue any public ferry which he deems unnecessary.

Every such declaration, establishment, change or discontinuance shall be made by notification in the local official Gazette.

3. The immediate superintend-

Superintendence of ferries.

ence of all public ferries shall, except as hereinafter provided,

be vested in the Député Commissioner of the district in which they are situate,

and he shall make all necessary arrangements for the supply of boats for such ferries, and for the collection of the authorized tolls leviable thereat.

4. The Chief Commissioner may

Management may be vested in local municipality;

direct that any public ferry situated within the limits of a town

may be managed by the officer or public body charged with the superintendence of the municipal arrangements of such town,

and may further direct that all

and proceeds paid into Municipal Fund.

or any part of the proceeds from such ferry shall be paid into the Municipal

Fund of such town,

and thereupon such ferry shall be managed, and such proceeds or part thereof shall be paid, accordingly.

5. The tolls of any public ferry

Letting ferry-tolls by auction. may be put up to public auction for such term not ex-

ceeding three years as may be deemed expedient by the Commissioner of the Division in which such ferry is situate, and may be let to the highest bidder.

The lessee shall conform to the rules made under this Act for the management and control of such ferry,

and may be called upon by the officer putting the tolls of the ferry up to auction to give such security for his good conduct and for the punctual payment of the rent as such officer may deem fit.

Such officer may, for sufficient reason duly recorded in writing, refuse to accept the offer of the highest bidder, and may accept any other bid, or may withdraw the tolls from auction.

6. Subject to the revision and

Power to make rules.

confirmation of the Chief Commissioner, the Commissioner of each Division shall have power to make rules consistent with this Act—

for the control and the management of all public ferries within his division;

for regulating the time and manner in which, and the terms on

which, the tolls of such ferries may be let by auction ;

for collecting the rents payable for the tolls of such ferries ;

and for fixing the limits of the same :

and, when the tolls of a ferry have been let under section five, he shall have power (subject as aforesaid) to make additional rules—

for regulating the number and kinds of boats and their dimensions, and the number of crew for each boat, which the lessee of the tolls will be required to keep ;

the hours during which he shall be bound to ply,

and the number of passengers, carts, carriages and animals, and the quantity of goods, that may be carried in each kind of boat at one trip ;

and for the keeping of such boats continually in good condition for the safe conveyance of passengers and property.

The lessee shall make such returns of traffic as the Commissioner may from time to time require.

7. No person shall, except with the sanction of the officer charged with the management of a public ferry, keep a ferry-boat for the purpose of plying for hire within the limits of such public ferry.

Nothing hereinbefore contained shall prevent persons plying between two places, one of which is without and one within the said

limits, or apply to boats which the Chief Commissioner expressly exempts from the operation of this section.

III.—Tolls.

8. Tolls, according to such rates

Tolls. as are from time to time fixed by the

Chief Commissioner, shall be levied on all persons, animals and other things carried by means of any public ferry :

Provided that the Chief Commissioner may, from time to time, declare what persons, animals or other things shall, when employed or transmitted on the public service, or for other sufficient reason, be exempt from payment of such tolls.

Where the tolls of a ferry have been let under section five, any such declaration, if made after the date of the auction, shall entitle the lessee to such abatement of the rent payable in respect of the tolls as may be fixed by the Commissioner of the Division with the concurrence of the Chief Commissioner.

9. The lessee or other person

Table of tolls. authorized to collect

the tolls of any public ferry, shall affix a table of such tolls, legibly written or printed in the vernacular language, in some conspicuous place near the ferry,

and shall be bound to produce, on demand, a list of the tolls, signed by the Deputy Commissioner or such other officer as he appoints on this behalf.

Private ferry not to ply within certain distance of public ferry without sanction.

10. All tolls or rents received under this Act shall, except in the cases provided for by section four, be credited to the district fund.

Tolls or rents to be credited to district fund.

IV.—Penalties.

11. Every lessee or other person authorized to collect the tolls of a public ferry, who neglects to affix and keep in good order and repair the table of tolls mentioned in section nine,

Penalty for failing to affix, or for removing, &c., table of tolls.

or who wilfully removes, alters or defaces such table, or allows it to become illegible,

or who fails to produce, on demand, the list of the tolls mentioned in section nine,

shall be liable to fine not exceeding twenty rupees.

12. Every such lessee or other person as aforesaid asking or taking other than the lawful toll,

Penalty for taking unauthorized toll,

or without due cause delaying any person, animal or other thing,

and for causing delay.

shall be liable to a penalty not exceeding fifty rupees.

13. In the event of any breach by a lessee of the tolls of a ferry, of the rules for the management of such ferry made under section six,

Cancelment of lease on breach of rules.

the Deputy Commissioner may impose upon him a fine not exceeding twenty rupees,

and in that event, or in the event of repeated liability to the penalties respectively provided by sections eleven and twelve,

the Deputy Commissioner may also, with the sanction of the Commissioner of the Division, cancel the lease of the tolls of such ferry and make other arrangements for its management during the whole or any part of the term for which the tolls were let.

14. Every person crossing at any public ferry who refuses to pay the proper toll,

Penalties on passengers of-fending.

or who, with intent of avoiding payment thereof, fraudulently or forcibly crosses any ferry-station without paying the toll,

or who obstructs any toll-collector or lessee of the tolls of public ferry, or any of his assistants, in any way in the execution of their duty under this Act,

shall be liable to fine not exceeding fifty rupees over and above the value of the damage, if any, which he has done.

15. Whoever conveys for hire any passenger, animal, cart, carriage or other vehicle, or any goods or merchandise, to or from any point within the limits assigned to each public ferry, in contra-

Penalty for plying within public ferry-course without license.

Part V.—BENGAL COUNCIL ACTS.

THE following Act passed by the Lieutenant-Governor of Bengal in Council, received the assent of His Honor on the 8th April 1873, and having been assented to by His Excellency the Governor-General on the 16th May 1873, is hereby promulgated for general information:—

ACT No. II. of 1873.

An Act to amend the District Municipal Improvement Act and the District Towns Act.

WHEREAS it is expedient, in modification of the District Municipal Improvement Act, being Bengal Act III. of 1864, and the District Towns Act, being Bengal Act VI. of 1868,

to provide for the election and rotation of municipal commissioners in places to which the operation of the said District Municipal Improvement Act has been or may be extended;

and to provide that such municipal commissioners may elect their vice-chairman;

and to provide that municipal bodies constituted under the provisions of the said District Municipal Improvement Act and the said District Towns Act shall be enabled to apply part of the funds under their charge to the establishment and maintenance of schools, and at the same time to ensure the voluntary application of the fund to such and similar purposes;

and, for the sake of convenience

in keeping the public accounts, to empower the Government to fix the date of the commencement of the municipal year;

It is hereby enacted as follows:—

1. The Lieutenant-Governor may, at any time, direct that the whole or any number, not less than two-thirds, of the municipal commissioners, whom he is empowered to ap-

Municipal commissioners may be elected in places to which the District Municipal Improvement Act is extended.

point by section 6 of the said District Municipal Improvement Act, shall be elected by the rate-payers, subject to such rules in regard to qualification and election as he may think fit. In any such election every person shall be entitled to vote who has paid the rate upon houses, buildings, and lands, that has become payable by him during the preceding year. All the provisions of the said section shall apply to commissioners so elected.

The Lieutenant-Governor may, at any time, withdraw such direction for the election of municipal commissioners.

2. Save as is hereinafter provided, every municipal commissioner shall vacate his office at the end of three years.

Municipal commissioner to vacate office at the end of three years.

When municipal commissioners are for the first time appointed or elected in any place to which

Rotation of commissioners.

the said District Municipal Improvement Act shall have been extended, one-third of the whole number (exclusive of the officers declared to be *ex-officio* commissioners by section 7 of the said Act and section 7 of Bengal Act VII. of 1867) shall retire at the end of one year, and another third at the end of two years, and the rest at the end of three years, to be computed from the first day of the year next following the date of the appointment or election of such commissioners. In case such whole number is not evenly divisible by three, the one-third shall be ascertained by taking the number next below it, which is evenly divisible by three, as the number to be divided. The commissioners who shall retire at the end of the first and second years respectively shall be decided by lot.

For the purposes of this section, the present municipal commissioners, holding office in any place to which the said Act has already been extended, shall be deemed to have been appointed on the date of the passing of this Act.

When any commissioners have been elected under

Application of rule separately to appointed and to elected commissioners.

the provisions of the last preceding section, the foregoing rule for the rotation of commissioners shall be applied separately to the commissioners who have been appointed, and se-

parately to the commissioners who have been elected.

Any person appointed or elected

Application when a commissioner has been appointed to fill a vacancy caused by resignation, discharge, removal, or death.

to any vacancy caused by the resignation, or discharge, or removal, or death of a commissioner, shall fill such vacancy for the unexpired

remainder of the term for which the outgoing member may have been elected or appointed.

Any person who vacates office

Any person vacating office may be re-appointed or re-elected.

under the operation of the rule of rotation prescribed in this section may be at any time re-appointed or re-elected.

3. The Lieutenant-Governor

Municipal commissioners, in places to which the District Municipal Improvement Act is extended, may be authorized to elect their vice-chairman.

may delegate to the municipal commissioners appointed under the said District Municipal Improvement Act the power to elect one of themselves to be their vice-chairman, sub-

ject to the approval of the Lieutenant-Governor. Provided that the vice-chairman, on the occurrence of a vacancy, shall always be elected by the commissioners, whenever any number of such commissioners has been elected under the provisions of section 1. Such vice-chairman shall hold office for one year, and shall be eligible for re-election at the end of each year, and may

at any time be removed from office by the municipal commissioners by a resolution in favour of which not less than two-thirds of the commissioners shall have voted. Provided that it shall be lawful for the Lieutenant-Governor to sanction the election permanently or for a term of years of a salaried vice-chairman if proposed by the commissioners.

4. In addition to the purposes to which the municipal fund may be applied under the provisions of section 16 of the said District Municipal

The municipal fund may be applied to the establishment and maintenance of schools.

Improvement Act, the said fund may be applied by the municipal commissioners, subject to the provisions of the said section, and, subject to such conditions as the commissioners may think fit to impose, to the establishment and maintenance of schools.

5. In addition to the purposes to which the town fund may be applied under the provisions of section 13 of the said District Towns Act, the said fund

The town fund may be applied to the establishment and maintenance of schools.

may be applied, subject to the provisions of the said Act, and subject to such conditions as the committee may think fit to impose, to the establishment and maintenance of schools.

6. Provided that no portion of the said municipal fund or of the

No portion of the funds to

be applied to schools, hospitals, dispensaries, or vaccination, unless by the vote of a majority at a meeting convened specially for the purpose.

Towns Act, or of this Act, to the establishment and maintenance of schools, or hospitals, or dispensaries, or to the promotion of vaccination, unless such application be sanctioned by the consent of a majority of the municipal commissioners or of the members of the town committee respectively, at a meeting specially convened for considering the question of such application.

7. For section twenty of the said District Municipal Improvement Act, the following section shall be substituted:—

“20. The chairman or vice-chairman shall, for the transaction of the business connected with, or for the purpose of making any order authorized by, this Act, exercise all the powers vested by this Act in the municipal commissioners.

Provided that it shall not be lawful for the chairman or vice-chairman to act in opposition to, or in contravention of, any order of the commissioners at a meeting, or to exercise any power which it is by this Act expressly declared shall be exercised only by the commissioners at a meeting.”

8. Notwithstanding anything contained in any of

The Lieutenant-Governor may fix the dates to be observed by municipal bodies, and the date from which the year shall commence.

the Acts mentioned in the schedule here-to annexed, the Lieutenant-Governor may, from time to time, by a notification in the *Calcutta Gazette*, fix the dates on which accounts and estimates shall be prepared and furnished by the commissioners, the municipal commissioners, or the town committee, appointed under the provisions of the said Acts respectively; and the date of the first day of the year, which shall be used by them for making estimates, regulating taxes, registering carts and other wheeled vehicles without springs, and doing all such things as by law they are required to do.

SCHEDULE.

Number of Act.	Title.
Act XXVI. of 1850	To enable improvements to be made in towns.
Bengal Act III. of 1864	The District Municipal Improvement Act.
Bengal Act VI. of 1867	For the better regulation of the police in towns and municipalities in the territories under the control of the Lieutenant-Governor of Bengal.
Bengal Act VII. of 1867	To amend Act III. of 1864.
Bengal Act VI. of 1868	The District Towns Act.

THE following Act passed by the Lieutenant-Governor of Bengal in Council, received the assent of His Honor on the 1st April 1873, and having been assented to by His Excellency the Governor General on the 19th May 1873, is hereby promulgated for general information:—

ACT NO. III. OF 1873.

An Act to amend Section 9, Act XI. of 1849, and Section 27, Act XXI. of 1856.

WHEREAS it is expedient to amend Act XI. of 1849 (*for securing the Abkari revenue of Calcutta*) and Act XXI. of 1856 (*to consolidate and amend the law relating to the Abkari revenue in the Presidency of Fort William in Bengal*);

It is hereby enacted as follows:—

1. For section nine of the said Act XI. of 1849 the following section shall be substituted:—

“9. Whenever a license shall be granted under this Act, the Collector shall be authorized to demand, in consideration of the privilege granted, such fee, tax, or duty, as may from time to time be fixed with the sanction of the Board of Revenue; or a fee, tax, or duty, adjusted or regulated in such manner and in accordance with such rules as the Board of Revenue may prescribe; and such fee, tax, or duty, shall be specified in the license, and shall be payable in advance or at such periods as the said Board may direct.”

Fee, tax, or duty payable for license.

Part I.—CIVIL RULINGS.

If these provisions of the Registration Act did not apply to instruments previously executed, the law of registration would be full of anomalies, and titles which were once secure would become insecure when a new Registration Act was passed. Had it been intended that these provisions should not be so far retrospective, the successive Acts, when repealed, would have been kept in force in this respect as to documents already executed. When Act XIX. of 1813 was passed, express provision was made that these provisions should not apply to documents executed before a certain date. No such provision is contained in the subsequent Acts. But the explanation of Sec. 50 in the present Act (VIII. of 1871) clearly assumes that the Acts applies to deeds already in existence. * * * * * The principle seems to be this, that non-registration will not impair the validity of a deed executed in good faith under the old law in force at the time of execution under which registration was optional, if possession has actually been acquired and enjoyed before the execution of the second deed.

In the case before us, the mortgagee never had possession. The mortgagor sold the property to the defendant, and the deed of sale was duly registered, and possession was acquired by the defendant. Under such circumstances, the re-

gistered deed of sale must prevail over the unregistered mortgage, and the plaintiff can only obtain a decree for money lent against Kristodhone Bose. * * * We set aside the decree of the Lower Appellate Court, and direct that the plaintiff do have a personal decree against the defendant Kristodhone for the sum of Rs. 99-1-8, with interest at 5 per cent. from this date until payment; and that the suit, so far as it seeks to render the property purchased by the defendant Soodharam liable under the mortgage-bond executed by Kristodhone in the year 1266, B. S., be dismissed; and that the plaintiff do pay to the defendant Soodharam his costs in this Court and the Courts below.

PRIVY COUNCIL

The 26th November, 1872.

UNNODA PERSAUD MOOKERJEE AND
OTHERS, *vs.* KRISTO COOMAL
MOITRO AND OTHERS.

Appeal from the Calcutta High Court.

Limitation in Rent Suits—Rule of construing Conflicting Statutes—special and general.

The bar of limitation applicable to an action for rent brought in the Collector's Court under Act X. of 1859 is that provided by S. 32 of the same Act, and not that provided by Act XIV. of 1859, Sec. 1, Clause 8.

A subsequent statute in general terms is not to be construed to repeal a previous particular statute, unless there are express words to indicate that such was the intention, or unless such an intention appears by necessary implication.

The single question to be decided in this appeal is whether to an action for rent brought in the Collector's Court under Act X. of 1859 (The Rent Act), the bar of limitation applicable to it is that provided by the 32nd Section of the same Act, or that provided by Act XIV. of 1859, passed six days later.

If the limitation of Section 32 of Act X. is still in force, the action is barred; but if, as the appellant contends, that Section has been repealed, and the limitation of Act XIV. is applicable to the case, then it is not.

The 32nd Section of Act X. enacts that suits for the recovery of arrears of rents shall be instituted within three years from the last day of the Bengal year, or from the last day of the month of Jeyt of the Fusley or Willayuttee year, in which the arrear shall have become due.

By Act XIV., Section 1, Clause 8, the limitation applicable to suits for the rent of any buildings or lands is the period of three years from the time the cause of action arose.

The present suit would be barred even under Act XIV., but for the operation of Clause 14 of that Act which provides that, in computing the period of limitation prescribed by that Act, the time occupied in prosecuting an abortive suit, shall, under certain conditions, be excluded. There has been litigation which would bring the pre-

sent case within this Section and prevent the suit being barred if Act XIV. is applicable to it. There is no analogous provision in Act X., and it is admitted by the appellant that, if that Act governs, the suit is barred. * * * * *

Difficulties have frequently been imposed on Courts of Justice in construing statutes, arising from the apparent conflict between special and general legislation; and the rule of construction that special legislation is not repealed by general enactments, unless a clear implication of that intention can be found, was adopted in early times to meet these difficulties, and has been acted on in numerous modern instances (See *Thorpe, v. Adams*, L. R., 6, C. B., 125; *The Queen, vs. Champneys*, *Id.*, (384). In the latter case, *Bovill, C. J.*, says—"It is a fundamental rule, in the construction of statutes, that a subsequent statute in general terms is not to be construed to repeal a previous particular statute, unless there are express words to indicate that such was the intention, or unless such an intention appears by necessary implication."

Their Lordships, upon a comparison of the two statutes in question, with reference to their objects, and considering that they were virtually contemporaneous Acts, have come to the conclusion that the intention to repeal the particular law is not made distinctly to appear, either by express words or

necessary implication, and, consequently, that the limitation of Act X. remains in force.

The appeal was dismissed.

CALCUTTA HIGH COURT.

The 6th March, 1873.

NUNDO LALL MITTER AND OTHERS,
PLAINTIFFS, vs. PRASUNNO MOYE
DEDIA, DEFENDANT.

*Pleadings—Mortgage—Issues Sec.
141 Act VIII. of 1859.*

The plaintiff sued to recover possession of certain premises alleging that the defendant had sold them to plaintiff's husband nearly twelve years before the commencement of the suit; the defendant absolutely denied the execution of the deed on which the plaintiff relied. The Moonsiff was satisfied that the deed had been executed, but perceiving that possession had not followed, had some doubt as to the nature of the transaction, and having examined a witness who had been originally named by the plaintiff, found the transaction not to be a sale but a mortgage. The Moonsiff being of opinion that the defendant was not entitled to the benefit of a fact which was neither pleaded nor relied upon, gave the plaintiff a decree. The Lower Appellate Court considering that the preliminary foreclosure proceedings had not been taken, reversed the decision of the Moonsiff.

Held 1st, that the oral evidence was properly admitted by the Moonsiff.

2nd, that it was incumbent on the first Court to frame an issue as to the nature of the transaction, whether a mortgage or a sale.

3rd, that the suit was properly dismissed by the Lower Appellate Court, because the plaintiff had not foreclosed the mortgage.

JACKSON, J.—It appears to us that the decision of the Lower Appellate Court in this case upon

the main question cannot be successfully assailed. The plaintiff's suit was to recover possession of certain premises on the allegation that the defendant had sold them to the plaintiff's husband in the year 1264, nearly twelve years before the time of the commencement of the suit.

The defendant absolutely denied the execution of the deed on which the plaintiff relied.

The Moonsiff, however, was satisfied upon the evidence that the deed had been executed, but perceiving that possession had not followed the execution of it, he seems to have had some doubt as to the nature of the transaction, and thereupon a witness named Nyan Chand Bose, who had been originally named as a witness by the plaintiff being examined, deposed that, contemporaneously with the execution of the deed, there had been a parole agreement to the effect that, if the sum of Rs. 500 advanced by the plaintiff's husband were repaid within five years, with interest at the rate of one per cent. per mensem, then the deed of sale should not take effect. Upon this the Moonsiff held that the alleged out-and-out-sale was in fact not a sale but a mortgage. The Moonsiff, however, remarking in strong terms upon the obstinacy of the defendant whom he had allowed time to compromise, but who, he says, "instead of compromising, brought forward an attorney, Baboo

Ashootosh Dhur, at great cost to argue her case," and being of opinion that the defendant was not entitled to the benefit of a fact which was neither pleaded nor relied upon, gave the plaintiff a decree.

On appeal, the Subordinate Judge, considering that as the evidence showed the transaction to have been one of mortgage, and as the preliminary foreclosure proceedings had not been taken, the plaintiff could not succeed, reversed the decision of the Moonsiff, and dismissed the plaintiff's suit.

In Special Appeal before us, it has been contended that the defendant has been in this way allowed the benefit of a case which she had not made, and that the evidence on which the transaction was found to be a mortgage was not admissible under the Full Bench Ruling in the case of Kasee Nath Chatterjee, *vs.* Chundy Churn Banerjee, reported at V., Weekly Reporter, Civil Rulings, page 68, and we have been asked to set aside the judgment of the Lower Appellate Court on these grounds. The special appellant also relied upon the ruling of the Privy Council in the case of Eshan Chunder Singh, *vs.* Shama Churn Bhutto, 6, Weekly Reporter, Privy Council Rulings, p. 57, to show that the Court must be guided by the allegations made, and the case put forward by the parties, and must not frame a case contrary to those allegations.

This is not a quite correct statement of the effect of that decision, because the observations of their Lordships show that the grounds to which they adverted were not raised or suggested either by the parties or the evidence in the case. Moreover, the decision arrived at in that case was one of fact come to by a Court whose province it was not to enquire into facts, the case having been one of special appeal. It appears to us that the admission of the evidence in this case as to the character of the transaction was in accordance with the decision of the Full Bench. The Chief Justice, in delivering judgment of the majority of the Judges in that case, said:—"If possession did not accompany or follow the absolute bill of sale, it would be a strong fact to show that the transaction was a mortgage, and not a sale, and it therefore becomes material to try whether the plaintiff was ever in possession and forcibly dispossessed as alleged by him, and whether having reference to the amount of the alleged purchase-money advanced and to the value of the interest alleged to be sold, and the acts and conduct of the parties, they intended to act upon the deed as an absolute sale, or to treat the transaction as a mortgage only, for I am of opinion that parole evidence is admissible to explain the acts of the parties, as, for example, to show why the plaintiff did not take possession in pursu-

ance of the bill of sale, if it be found that the defendant retained possession, and that the plaintiff never had possession as alleged by him, and was near forcibly dispossessed."

In the case before us, there was no allegation of possession having followed the execution of the deed. The Court had to consider the circumstance of the execution of the deed which was proved not being followed by possession. That it was said by the Chief Justice in the Full Bench case, would be a strong circumstance to show that the transaction was a mortgage, and not a sale; and if it would be a strong circumstance to show that the transaction was a mortgage, we think it would certainly be in the present case a circumstance producing doubt in the mind of the Court whether really the transaction was an out-and-out-sale, and oral evidence admitted under such circumstances would be likely to explain the conduct of the parties. We think, therefore, that the evidence was properly admitted.

As to the issue being raised, Section 141 of the Civil Procedure Code says:—"At any time before the decision of the case, the Court may amend the issues, or frame additional issues on such terms as to it shall seem fit, and all such amendments as may be necessary for the purpose of determining the real question or controversy be-

tween the parties shall be so made." It was, therefore, we think incumbent on the Court to frame the issue whether the transaction was really an out-and-out-sale or a mortgage. That it was a mortgage is, we think, quite clear; and as the plaintiff is not entitled to recover possession without taking the necessary preliminary measures, we think the suit must be dismissed; but as the additional issue was not raised in the pleadings, and as the conduct of the defendant throughout has been extremely bad, it seems that we ought to modify the decision of the Lower Appellate Court by ordering her to pay her own costs of all the proceedings in this suit. If the plaintiff is desirous of taking proceedings against the defendant in consequence of her making the false verification in the written statement in this case, he will have the sanction of this Court.

PRIVY COUNCIL.

The 6th March, 1873.

JOY NARAIN GIRI, *vs.* SHEED PROSAUD GIRI AND OTHERS.

Appeal from the Calcutta High Court.

Joint Property—Findings on Facts—Loss of Papers in the Cyclone.

Where both the Courts below disbelieved the statement of a party and found a fact after proper enquiries,—the Privy Council saw no ground for reversing that decision.

A party alleging that all papers connected with a transaction by which he could prove

his allegation were lost in the cyclone, and giving his own deposition, was disbelieved as the statement was almost entirely unsupported by any evidence except his own, that evidence being of a very unsatisfactory character.

Their Lordships are of opinion that the ordinary rule which they have observed respecting the findings on questions of fact by two Courts applies in this case. It was a case in which the plaintiff alleged that he and the defendant had lived in commensality and enjoyed certain joint property of which the defendant being the elder was the manager; that the defendant had claimed exclusive possession as against him, and their commensality had ceased, and he applied for his share of the joint property. The defendant alleged that the property was not joint. Upon that issue both Courts have found against him, and it is not now contended that the finding is not right with respect to the bulk of the property. But it is alleged that, with respect to a certain portion of the plaintiff's claim, the decision is wrong, or at all events that some further enquiries should be instituted. That portion of the claim is this: It appears that the plaintiff and defendant held a joint lease of certain khas lands from the Government, and certain joint property had been deposited as a security for the payment of the rent of the Government, but the defendant alleges that, since the institution of this suit, that property had been

taken possession of by the Government in consequence of the failure of the ryots to pay the rent, which he attributes to a certain cyclone which occurred in 1864, wherefore he was unable to pay the plaintiff his share of it; and he further alleges that all papers connected with the transaction by which he could prove this part of his allegation were lost in the cyclone. Both Courts appear to have disbelieved the defendant's statement upon this matter, which was almost entirely unsupported by any evidence except his own, that evidence being of a very unsatisfactory character. It appears to their Lordships that the whole of this part of case was in fact before both Courts, and the defendant, if he had a case, might have proved it, and they are not disposed to set aside the finding of the Courts that the plaintiff is entitled to his half of this joint property which was deposited as a security for the payment of the rent with the Government. As to the amount of mesne profits to which he would be entitled, that is another question, but that has not been concluded, and will be determined upon execution. It appears to their Lordships that this is the only matter upon which any enquiry could be necessary, and upon this an enquiry will be held. There was also a question as to the plaintiff's right to recover certain nijjote lands which the defendant

said he had given up to the landlord. The Courts below did not believe his story upon that, they did not believe that he proved that they were given up to the landlord; but if they have been given up to the landlord, then the plaintiff will not get them in execution.

On the whole their Lordships see no ground for reversing the decision of the two Courts, which appears to be on questions of fact which they have properly enquired into; and under these circumstances their Lordships will humbly advise Her Majesty to dismiss this appeal, and to affirm the judgment of the Court below.

CALCUTTA HIGH COURT.

The 2nd April, 1873.

HADJEE ABDULLA AND ANOTHER,
PETITIONERS.

Indian Registration Act (VIII. of 1871,) Section 76—Review—Act XXIII. of 1861, Sec. 38.

A District Judge has no power to review an order passed under Sec. 73, Act VIII. of 1871.

Mr. Twiss and Baboo Romesh Chunder Miller for Petitioners.

On the death of Mussammut Noorun, her son-in-law, Heassut Hossein, made application to the Sub-Registrar of Gya for the registration of a deed of gift from the deceased in favor of her grandchildren. On the objection of the petitioners, the Sub-Registrar refused to register the deed. Reassut Hossein applied to the Judge un-

der Sec. 73, Act VIII. of 1871, to establish his right to have the deed registered. The application was rejected by Mr. Taylor, the Judge, on the ground that the execution of the deed was not satisfactorily proved. He applied for a review of this judgment and the then Judge of Gya (Mr. Craster) directed that the case be placed upon the review file and be argued.

PHEAR, J.—It appears to me that the Judge has taken an erroneous view of the extent of his jurisdiction in this matter. If he were right, the consequence would be that, whereas in regular civil suits, in suits before the Collector's Court under Act X. of 1859, and in suits which are dependent upon the provisions of Bengal Act VIII. of 1869, the procedure for review is strictly laid down and limited in respect to the time and the cause, yet in a summary case like the present, the Court would be unrestricted in every way. It would not be obliged to confine its review to matter which was new since the former hearing, or to any of those points which are prescribed in the general Civil Procedure Code. The Judge might in fact on review hear on appeal from the decision of his predecessor upon precisely the same materials as those upon which his predecessor formed his judgment, and he might do this without any limit, as far as I see, with regard to time; and again his own decision upon review might be reviewed there.

after equally without limit as to time. The consequence would be that we should have here a perfectly unrestrained system of appeal upon appeal without any sort of limitation. And, indeed, as far as I understand the present case, the review which has been admitted is of the nature of an appeal from the judgment of Mr. Taylor. No doubt, every Court has so far the power to review its own decision as may be necessary for the purpose of making that decision in terms accord with the intention of the Court entertained at the time of passing it : for instance, to correct verbal errors, or otherwise to make the formal decree an accurate expression of the judgment which the Court intended to pass. But I am of opinion that an inferior Court of limited jurisdiction does not possess the general power of reviewing its own decision which the Judge appears to think that every Court necessarily does possess. I may say that even the Court of Chancery in England, whose powers are as general as the powers of a Civil Court well can be, does not exercise the power of reviewing its own judgment except when error of law is apparent on the face of the judgment, or when new matter is brought to its notice which could not have been adduced before it at the time when the decree was made.

On the whole then it seems to me as I have already said that the

Zillah Courts have not got the general power of reviewing their own judgments which would be necessary in order to support the exercise of jurisdiction which the Judge here has affected to make. It follows therefore that the admitting of the review was in this respect *ultra vires*, and the rule setting aside the order will be made absolute with costs.

PRIVY COUNCIL.

The 30th November, 1872.

GOOPÉE LALL, rs. MUSSAMUT SREE
CHUNDRAOOLÉE BHOOLJEE.

*Appeal from the High Court,
N. W. P.*

*Hindoo Law—Second adoption in
the life-time of a son previously
adopted—Pleading—New Case.*

As a Hindoo cannot, while he has an adopted son living, adopt another son ; so neither can his widow, after his death, by virtue of any authority delegated from him, adopt a son while an adopted son is still living.

Defendants who have represented the fact of an adoption which they erroneously conclude to be an adoption valid in law, cannot be charged with misrepresentation so far as the fact is concerned, and are not estopped from setting up the true facts of the case.

Even if a plaintiff has been misled, by various representations of the defendant, into framing his suit in a particular way, still he can only recover according to his allegations and proofs, and cannot be allowed to set up an entirely new case not set up or hinted at in the plaint.

This was a suit brought to recover possession of a temple and certain jewels and valuables held

therewith. The plaintiff claimed as heir of one Luchmunjee. He endeavoured to prove his heirship in this way. He asserted that his grandfather Damodurjee had two wives, Luchmee and Charmuttee; that, shortly before his death, he gave a power to his wives to adopt two sons; that after his death, his first widow Luchmee adopted Gobindjee, the father of the plaintiff; that some four years afterwards, the second widow Charmuttee adopted Luchmunjee, through whom the plaintiff claims. The plaintiff asserts that on the death of Luchmunjee, who according to his case was his uncle, he became the heir to Luchmunjee, who was in possession of the property. He admits that the defendant, the widow of Luchmunjee, had a life-interest in the property, but he alleges that she had forfeited that life-interest by committing waste.

The Principal Sudder Amcen found in effect that the plaintiff had proved the whole of his case. The High Court reversed the decision of the Principal Sudder Amcen: they expressed themselves by no means satisfied that the defendant had forfeited the property by committing waste; but they deemed it unnecessary to decide this question, inasmuch as they came to the conclusion that the plaintiff had failed to prove his heirship to Luchmunjee. They were by no means satisfied that the plaintiff proved all the facts on

which he relied; but they came to the conclusion that, assuming all those facts to be proved, as the plaintiff alleged them, still in point of law his case failed for this reason that, according to Hindoo Law, there cannot be two valid successive adoptions, and that the first widow having adopted a son, Gobindjee, the second widow could not, while Gobindjee was alive, make another valid adoption.

The question of successive adoptions was argued very elaborately and very carefully considered in the case of *Rungama, vs. Atchama* and others, reported in the 4th volume of Moore's Privy Council Appeals, p. 1. (7, W. R., P. C., p. 57); and since the decision of that case, whatever doubts may have been entertained on the question before, it must be considered as settled law that a man cannot, while he has an adopted son living, adopt another son. And in their Lordship's opinion, it follows on principle that a man cannot delegate to others, to be exercised after his death, any greater power than he himself possessed in his life-time; and that inasmuch as he, Damodurjee, could not, one adopted son being living, adopt another, his second widow Charmuttee could not, by virtue of any authority delegated from him, adopt a son while an adopted son was living.

Their Lordships therefore concur with the judgment of the High Court, which amounts to this that,

assuming all the plaintiff's facts as he alleges them in his own favor, still that in point of law the second adoption was invalid, and that consequently there was no relationship between him and the second adopted son Luchmunjee, under whom he claims.

That being so, their Lordships do not think it necessary to give an opinion as to whether the facts on which the plaintiff relies have been substantiated or not. Assuming them to have been substantiated, his case in point of law fails.

It has been argued on the part of the appellant that the defendants in this case are estopped from setting up the true facts of the case, or even asserting the law in their favor, in as much they have represented in former suits and in various ways, by letters and by their actions, that Luchmunjee was the adopted son of Damodurjee adopted by Damodurjee's widow, his mother. But it appears to their Lordships that there is no estoppel in the case. There has been no misrepresentation on the part of Luchmunjee or the defendant on any matter of fact. They are alleged to have represented that Luchmunjee was adopted. The plaintiff's case is that Luchmunjee was in fact adopted. So far as the fact is concerned, there is no misrepresentation. It comes to no more than this that they have arrived at a conclusion that the

adoption which is admitted in fact was valid in law, a conclusion which in their Lordship's judgment is erroneous; but that creates no estoppel whatever between the parties.

It may further be observed that, if Luchmunjee's statement is to be taken, it must be taken as a whole; and what he asserts is that he was validly adopted. But if he was validly adopted, it follows that the plaintiff was invalidly adopted; and therefore in this view of the case, it appears to their Lordships that no reliance can be placed upon this question of estoppel.

It has indeed been further argued that, even putting it not so high as estoppel, still the plaintiff has been misled, by various representations made by the defendant, into framing his suit as it is now framed. If that were so, it would not empower their Lordships to depart from the rule which has always prevailed that a man must recover according to his allegations and his proofs. It would not enable their Lordships to allow (as the appellant asks them to allow) an entirely new case to be now brought forward before them, which is not even set up or hinted at in the plaint.

The new case suggested appears to be that, assuming an invalid adoption of Luchmunjee, and treating Luchmunjee as a mere trespasser, still the plaintiff could recover by proof of his title from

Damodurjee. Whether he has such a case or not, their Lordships do not think it necessary to decide, but they feel themselves bound to say that that case cannot be gone into, inasmuch as it has not been set up in the plaint. Their Lordships do not desire to construe plaints with any extreme strictness or technicality, but it would manifestly be extremely inconvenient, and certainly contrary to their practice, to allow a case to be raised here which is entirely different from the one which has been previously insisted upon.

For these reasons their Lordships are of opinion that the decree of the High Court is right and ought to be affirmed. Their Lordships understand the High Court simply to have ruled that the plaintiffs had failed to prove the title on which they sued, that the Principal Sudder Ameen's decree ought therefore to be reversed, and the suit dismissed with costs. But in as much as the formal decree, which simply orders that the appeal be decreed with costs, and the decision of the Principal Sudder Ameen reversed, may hereafter lead to some doubt as to what was really decided by the High Court, their Lordships think that the formal decree should be varied by ordering that the decision of the Principal Sudder Ameen be reversed, and the suit dismissed with costs in both Courts, and their Lordships will humbly advise Her Majesty to

this effect. The appellants must pay the costs of this appeal.

CALCUTTA HIGH COURT.

FULL BENCH.

The 1st April, 1873.

CHUNDER COOMAR MUNDUL AND
OTHERS, *Plaintiffs,*

vs.

NAMNI KHANUM, *Defendant.*

*Collector's Judgment on a Pottah—
Res Judicata—Act X. of 1859,
Sec. 23, Cl. 6.*

A person brought a suit against his landlord, in the Revenue Court, under Act X. of 1859, Sec. 23, Cl. 6, for the recovery of possession of lands, claiming to hold the land under a mowrosee pottah. The landlord impugned the pottah as spurious, and upon trial the pottah was found to be genuine, and the plaintiff got a decree.

The landlord now brings a civil suit to eject the heirs of the plaintiff in the suit under Act X. from the lands in the above suit.

The Full Bench decided that the decision of the Revenue Court as to the pottah is not conclusive between the parties.

Judgments of the Full Bench.

COUCH, C. J.—In 1866, one Bakir Ali brought a suit in a Revenue Court, under Clause 6, Section 23 of Act X. of 1859, against the present plaintiffs, to recover possession of four beegahs of land, alleging that he held it under a mowrosee lease granted by the plaintiffs, and that they had dispossessed him by proceedings taken in the execution of a decree which they had recovered

against his brother. The plaintiffs, in their answer, denied that he was their tenant, and said the mokurra-ree pottah was a spurious document. The Deputy Collector held that it was genuine, and gave a decree to Bakir Ali for possession under it. This decision was confirmed by the Judge on appeal, and a special appeal from his decision was rejected by this Court. The defendants are the heirs of Bakir Ali, and the plaintiffs have brought the present suit to be restored to the possession of the lands of which the possession was so decreed to Bakir Ali.

The objection taken before the Subordinate Judge seems to have been that the suit was not maintainable, because the validity of the pottah had been established in the former suit. He held that the suit was maintainable, but that the pottah was a genuine one, and dismissed the suit with costs.

On appeal, the Judge has held that the decision in the former suit is conclusive in this suit, and that the plaintiffs cannot now contend that the pottah is not genuine, and has dismissed the appeal without deciding whether it is genuine.

Thereupon the plaintiffs have preferred a special appeal to this Court, and the Division Bench, before which it came for hearing, has referred to a Full Bench the question "whether the previous decision as to the pottah is or is not conclusive between the parties."

The case illustrates the defects of the present system of special appeal. There is a very strong probability, to say the least, that if the Judge had determined the question whether the pottah is genuine, he would have found it to be so; and that if this Court had power to decide the question of fact, it would find so; but the special appeal is brought for an error in law in holding that the previous decision is conclusive. The Division Court has been unable to come to a decision upon this question, and the Full Bench has to decide it. Under a better procedure, the case would be decided on its merits, and this question would most probably be an immaterial one. It must, however, now be answered.

The rule applicable to it is laid down in the *Duchess of Kingston's* case, first, that the judgment of a Court of concurrent jurisdiction, directly upon the point, is as a plea in bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another Court; secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter between the same parties, coming incidentally in question in another Court for a different purpose. Mr. Justice Mitter, in his judgment in this case, after calling this an estoppel, says:—"The late learned Chief Justice of this Court seems

to have thrown considerable doubts upon the propriety of introducing the doctrine of estoppel in this country in the judgment delivered by him in the case of *Mussammut Edun*, reported in page 175 of the 8th Weekly Reporter. That doctrine, it was observed, is one peculiar to the law of England. It is intimately connected with the English law of pleadings which has no existence in our Courts, and as its tendency is to shut out the truth, it may well be doubted whether those Courts, which are by their very constitution Courts of equity and good conscience, would be justified in adopting a doctrine which has such a tendency." These remarks oblige me to quote from the judgment of the Judicial Committee in *Khagowlee Singh, vs. Hossein Buksh Khan*, 7, Bengal Law Reports, 673. After quoting the well-known passage from the *Duchess of Kingston's* case, their Lordships say:—"There is nothing technical or peculiar to the law of England in the rule as so stated. It was recognized by the Civil law, and it is perfectly consistent with the second Section of the Code of Procedure under which this case was tried, which says I have carefully read the report of the case at page 175 of the 8th Weekly Reporter, and I have not found it any where stated that the doctrine "is one peculiar to the law of England." Upon the remark that it is intimately con-

nected with the English law of pleadings (meaning I presume common law pleadings,) and that it may well be doubted whether our Courts would be justified in adopting it, I will only observe that the English Courts of Equity have adopted it, as may be seen in *Barrs, vs. Jackson*, L., Phillips, 582; L., Young and Collyer, C. C., 585. Vice Chancellor Knight Bruce, in his judgment in this case, quotes various passages from the Civil law, showing the reason of the rule. That the judgment of a Court of competent jurisdiction upon a question directly raised before it shall be accepted between the parties to the suit as true seems to me to be a rule which should be adopted in our Courts. Section 23 of Act X. of 1859 gave jurisdiction to the Collectors in certain suits, and amongst them, by Clause 6, in all suits to recover the occupancy or possession of any land, farm or tenure, from which a ryot, farmer, or tenant has been illegally ejected by the person entitled to receive rent for the same. Mr. Woodroffe, who appeared for the appellants, relied upon the decision of a Full Bench in 7, Weekly Reporter, 186, and also argued that illegally ejected means ejected otherwise than by due form of law. In the Full Bench case, the Chief Justice delivering judgment said:—"We think that the words 'suits to recover the occupancy or possession of any land' in Clause 6, Section

23 of Act X. of 1859 refer only to possessory actions against the person entitled to receive the rent, and not to suits in which the plaintiff sets out his title and seeks to have his right declared and possession given him in pursuance of that title." Bakir Ali's suit was to recover possession, and he alleged that he had been dispossessed by the plaintiffs by proceedings taken in execution of a decree against another person, which would be clearly illegal. I have no doubt that it was a suit within Clause 6 of Section 23; and as the plaintiff alleged that he held under a mowrosee lease, it was necessary for the Deputy Collector to determine whether the lease was genuine. I must here observe that concurrent jurisdiction in my opinion refers to the matter decided upon, and it is not necessary, as Mr. Justice Mitter seems to think, that the Court whose judgment is to be conclusive should have been able to entertain the suit in which it is to be used. If it were so, a person who had sued another in the Small Cause Court of Calcutta for a debt, and obtained a judgment, could not use it in a suit in the High Court against the same person as proof that the latter was indebted to him, if the suit in the High Court was of such a nature as not to be cognizable by the Small Cause Court.

It appears to me that the question referred to us must be deter-

mined by considering what the point, upon which the judgment in the suit before the Deputy Collector was given, was. The suit was to recover possession of land from which a tenant had been illegally ejected. The Deputy Collector had to determine two questions: was the plaintiff a tenant of the land? Had he been illegally ejected by the person entitled to receive rent for it? To determine the first of these, it was necessary for him to find whether the alleged lease was genuine; but the real judgment in the suit was that the plaintiff was a tenant, the pottah being the proof of it. The Deputy Collector had no jurisdiction to give effect to the pottah as a permanent title; he could only use it as showing that at that time the plaintiff had a right to the possession of the land. It was laid down by Lord Ellenborough in *Outram, vs. Moorwood*, 3, East, 357, that a judgment is final only for its own proper purpose and object, and no other. The suit now before the Court is against the heirs of Bakir Ali, whose case is that he had a mowrosee pottah; but the Deputy Collector had not power in the suit before him to adjudicate that the tenancy was hereditary; and if his judgment is to be taken as being directly on that point, his is not a Court of concurrent jurisdiction. His finding upon the pottah, except so far as it established the right of Bakir Ali to the possession of the land when he was

ejected, must be considered a finding upon a collateral matter.

In my opinion, therefore, the question referred ought to be answered in the negative.

JACKSON, J.—(Did neither dissent from the conclusion arrived at in the above judgment nor did he give his express assent.)

PHEAR, J. —(After shortly stating the facts of the case.) Now, it must be observed at the outset that the Collector's Court was a Court of limited jurisdiction, and that it had no power to determine between the parties a question of right to the land larger than the bare *right to possession*. It so happened that the plaintiff's right to possession as he alleged it was clothed with mowrosee incidents, but the Collector's Court had no authority to determine whether such incidents existed or not; and indeed it is for this very reason that the Munduls are undoubtedly entitled, notwithstanding the Collector's decision against them in the former suit, to come to the Civil Court to have the question as to the mowrosee right tried in the present suit. If they are here to be successfully met with the objection that the Collector has already finally determined the question of the validity of the pottah, then it is obvious the result is that the Collector has indirectly, if not directly, determined a question between the parties, which was beyond his powers, and has in effect ousted the Court of superior

jurisdiction, for the latter will have nothing left to it, but to, in effect, register the Collector's decision. This clearly cannot be right. And the explanation is to my mind furnished by the discussion of the matter, which I offered in *Mussammut Edun's case*. I will not now go over the same ground again. I will simply confine myself to saying very shortly that I think the decision of the Collector upon the issue which is now before the Court, although he was unquestionably competent to try that issue for the purposes of the suit before him, did not effect a *res adjudicata* between the parties for all other purposes, and this for both the reasons given by Sir W. De-Grey in the *Duchess of Kingston's case*: first, the Collector had not concurrent jurisdiction with the Civil Court to the full extent of the matter involved in that issue; second, the issue as to the execution and authenticity of the pottah was a question of evidence collateral to the matter which the Collector had to determine.

I will add that, while it is no doubt most important in this country as in every other to give as much finality as possible to judicial determination of matters of dispute between parties, it is especially necessary in view of the inefficiency very generally displayed by our Indian Courts in the investigation and ascertainment of facts, that we should be watchful not to shut out

a litigant without good reason from an opportunity of showing the truth of his case.

I think the question put to us should be answered in the negative.

MARKBY, J.—In this case, I also would answer the question put in the negative. But I base my opinion entirely upon the peculiar character of the Court in which the former suit was tried. It was a Court the jurisdiction of which is defined by Section 23 of Act X. of 1859. In some of the suits enumerated in that Section, it is obvious that questions of title must sometimes arise; and it also appears from Section 103 that the Legislature contemplated that these questions would arise, and made special provisions, in case they should arise, that an appeal should lie to the ordinary Civil Court. It might, therefore, have been thought that the Legislature considered that questions of title could be finally adjudicated upon by suits instituted in these Courts. But the Privy Council have held in the case of *Khoogowlee Singh, vs. Hossein Dux Khan*, 7, B. L. R., 679, that the decision of a Collector in such a Court upon a question of title in a suit brought under Clause 2 of Section 23 of Act X. of 1859 is not a decision of a Court competent to adjudicate on a question of title. It is true that this is only one of the reasons given for not treating the Collector's decision as conclusive in that case. It is true also

that the suit which the Collector had tried in that case was for rent under Section 2, whereas this was to recover possession under Clause 6. But the expression of opinion as to the competency of the Collector is clear and distinct, and is in accordance with opinions of high authority which have been expressed in this Court as is shown in the judgment of Mr. Justice Mitter. Nor is it possible to say that the Court which is incompetent to adjudicate upon questions of title in a suit for rent is competent to do so in a suit for possession. The ground of incompetency of these Courts, as pointed out by the Privy Council, is the special and summary character of their jurisdictions.

Upon these grounds, I answer the question put in the negative.

AINSLIE, J.—I concur in the judgment delivered by the Chief Justice.

CALCUTTA HIGH COURT.

The 7th March, 1873.

MESSRS. R. WATSON & Co.,

vs.

KRISTO MOHUN RUKHIT & OTHERS.

Rent Suits—Indivisible Tenure.

MITTER, J.—In these cases we do not think it necessary to express any opinion on the preliminary objection which was raised by the pleader for the respondent under the provisions of Section 102 Act VIII. of 1869 B. C. It is sufficient for us to say that both the Lower

Courts have concurrently found that the tenure in question was one indivisible tenure, and the plaintiff, special appellant, had no right to split it up into different parts and to institute different suits against the tenant for arrears of rent. It has been contended that the Lower Courts have misunderstood the settlement proceedings; but this contention has not been made out to our satisfaction.

We dismiss these appeals, and we allow costs in those cases in which the respondents have appeared.

CALCUTTA HIGH COURT.

The 21st June, 1873.

HURRYHUR MOOKERJEE, *Petitioner,*
vs.

NOBIN CHUNDER DOSS, *Opposite*
Party.

Section 246 of Act VIII. of 1859—

Benamée purchase for the Judgment-debtor.

Hurryhur Mookerjee obtained a decree against Soobid Narain and attached a property which was claimed by Nobin Chunder Doss as purchased by him before the attachment: The Subordinate Judge was of opinion that the evidence as to the possession of the claimant was not very satisfactory and that it also appeared to him that there was reason to believe that the alleged sale was in fraud of creditors, but as he thought that he was not competent under Section 246 to enter into that part of the enquiry and finding that there was some evidence of the possession of the claimant, he allowed the claim and referred the petitioner to a Regular suit.

Held, that the Subordinate Judge ought to have enquired into the question as to whether the properties which the claimant alleged he had purchased were purchased by him benamée for the judgment-debtor or not, for Section 246 directs that the Court shall enquire whether the property attached is or is not in the possession of the party against whom execution is sought or of some other person in trust for him. The decree-holder having alleged that Nobin was a mere benamée, it was not only competent but incumbent upon the Subordinate Judge to enquire into that question under Section 246.

This is an application on behalf of Hurryhur Mookerjee a Decree-holder. He obtained a decree against Soobid Narain. Upon this, one Nobin Chunder Doss, alleging that he purchased the properties attached from the judgment-debtor before the attachment, lodged a claim. The Subordinate Judge was of opinion that the evidence as to the possession of the claimant was not very satisfactory and that it also appeared to him that there was reason to believe that the alleged sale was in fraud of creditors, but as he thought that he was not competent under Section 246 to enter into that part of the enquiry and finding that there was some evidence of the possession of the claimant he allowed the claim and referred the petitioner to a Regular suit. Upon this the petitioner the Decree-holder applied to this Court and obtained a rule on the opposite party to show cause why the order

of the Judge should not be set aside and the Judge directed to proceed under Section 246.

We think, it is clear, that the Subordinate Judge ought to have enquired into the question as to whether the properties which the claimant alleged he had purchased were purchased by him benamee for the judgment-debtor or not for the Section in question, namely Section 216 directs that the Court shall enquire whether the property attached is or not in the possession of the party against whom execution is sought or of some other person in trust for him. Now it was clearly alleged by the decree-holder that Nobin Chunder Doss the complainant was a mere benamee for the judgment-debtor Soobid Narain and therefore it was not only competent but incumbent upon the Subordinate Judge to enquire into that question under Section 216, but we think in this case that it would not be advisable to direct the Subordinate Judge to do so and make this rule absolute in as much as the complainant has a remedy by regular suit and it is only in cases where there is no remedy that this Court ought to interfere under the special provision of the Charter. We therefore discharge this rule but under the circumstances of the case we think it ought to be discharged without costs.

CALCUTTA HIGH COURT.

FULL BENCH.

The 18th December, 1872.

Wise, (Decree-Holder) vs. RAJNARAIN CHUCKERBUTTY (a Judgment-Debtor.)

Limitation—Act XIV. of 1859, Sec. 20—Execution—Decree.

Where in a suit for rent, a decree was made against one person for the rent of one period and against another person for the rent of another, and execution was taken against one only, *held* that the decree must be taken as a separate decree against each for the sum for which each was liable, and consequently that execution proceedings against one would not prevent the law of limitation applying to bar execution against the other.

The Judgment of the Full Bench was delivered by

COUCH, C. J. The suit appears to have been brought to recover arrears of rent* for 28 years, and it appears that one of the defendants Gourisunkur had been in possession up to a certain time, and that then the possession had been transferred by sale and purchase from him to Mr. Gasper, and there was no joint liability.

Each person was liable for the rent for the period during which he or she had occupied, and the decree was, in the first instance, made by the Munsif, apparently, in that form. The Principal Sudder Ameen appears to have modified that on an Appeal, and to have declared that the rent was to

* Of a putni talook. The suit was brought in the year 1853.

Part II.—CRIMINAL RULINGS.

have been committed to the Sessions, there being no question as to the extent of the Magistrate's power under Section 46 of the Code.

Under Section 297 Code of Criminal Procedure, this Court can, whenever there has been any material error in any judicial proceeding, pass such judgment, sentence, or order as it thinks fit; and, under this Section it appears to me that the order of the Deputy Magistrate convicting the accused should be quashed, and the Deputy Magistrate be directed to commit the prisoner for trial to the Sessions Court.

CALCUTTA HIGH COURT.

The 17th April, 1873.

J. G. BAGRAM,—*Petitioner.*

Acquittal—Act X. of 1872, S. 212.

PHEAR, J.—It seems to me very clear that in this case Mr. Bagram's complaint was, rightly or wrongly, *dismissed* by the Magistrate in the exercise of a judicial discretion. The consequence is that, by the operation of Section 212 of the new Criminal Procedure Code, the dismissal had the effect of an acquittal of the accused person. And we have no jurisdiction to entertain any application to interfere with the acquittal of an accused person except the application be made either by Government or un-

der the sanction of Government. The present application must therefore fail.

Right of Cross-examination of Witnesses for the Prosecution—Act X. of 1872, Secs. 218, 286, & 362.

When the charge has been framed and the defendant put on his defence, he has a right, under Sec. 218 of the Criminal Procedure Code (Act X. of 1872), to have the prosecutor's witnesses recalled for the purpose of cross-examination.

The claim to recall the witnesses for the prosecution is very different from the request made by the accused person to summon a witness under Sec. 362, Act X. of 1872.

No appeal lies to the Sessions Court from the order of the Deputy Magistrate refusing to recall the witnesses for the prosecution for the purpose of cross-examination, but the order is such an error as cannot be immediately corrected except by the interposition of the High Court under its powers of Superintendence and Revision. *C. H. C., 16th April, 1873, J. R. Belilios—Petitioner.*

Maintenance, Order for—Criminal Procedure Code (Act X. of 1872), Secs. 536, 537—Mahomedan Law—Divorce.

PHEAR, J.—It appears to me quite clear that change of circumstance, even if it were such as to

justify the withdrawal of the order of maintenance against the wife altogether, would not relieve the husband from the necessity of obedience to the order during the time which had elapsed up to the date when and until that change of circumstance had occurred; in other words, that the husband was at any rate strictly bound to pay the maintenance money according to the terms of the order up to the date when in the Magistrate's presence he divorced his wife, as the Deputy Magistrate says he did.—*C. H. C., 18th April, 1873, Nepoor Aurut, X., B. L. R., App., p. 33.*

Code of Criminal Procedure—Act XXV. of 1861, Sec. 62 (Act X. of 1872, Sec. 518)—Rival Hāls—Power of Magistrate—Riot—Affray.

FULL BENCH.—A Magistrate has power, under Section 62, of Act XXV. of 1861 (S. 518 of Act X. of 1872), to prohibit a particular landholder from holding a *hāt* on a particular spot on a particular day, at least for a temporary period, if he is satisfied upon reasonable grounds that the order is likely to prevent, or tends to prevent, a riot or an affray.—*Calcutta High Court, 9th September, 1872, Bykunto Ram Shaha Roy.*

Evidence Act (I. of 1872), Sec. 30—Confession of a Prisoner when admissible against Co-prisoner.

Before the confession of a person jointly tried with the prisoner can

be taken into consideration against him, it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used, in the commission of the offence for which the prisoners are being jointly tried. It seems that it is this implication of himself by the confessing person which is intended by the Legislature to take the place as it were of the sanction of an oath, or rather which is supposed to serve as some guarantee for the truth of the accusation against the other.—*Calcutta High Court, 24th April, 1873, Belat Ally, X., B. L. R., p. 453.*

Criminal Procedure Code—Act XXV. of 1861, Sec. 282 (Act X. of 1872, Sec. 491)—Power of Magistrate—Breach of the Peace—Wrongful Act.

Under Sec. 282 of Act XXV. of 1861, a Magistrate can prevent a person from doing a wrongful act, but not one which the person may lawfully do. It was not intended that a person should be prevented by a Magistrate from exercising his rights of property, because another person would be likely to commit a breach of the peace if he did so.—*Calcutta High Court, 19th March, 1873, Kasey Chunder Doss, X., B. L. R., p. 441.*

Part III.—SHORT NOTES OF CIVIL RULINGS.

Security for Costs under Section 34 of Act VIII. of 1859, is not required in a suit for partition of a property of which the plaintiff is admittedly a shareholder.

PONTIFEX, J.—The provisions of Sec. 34 of the Code of Civil Procedure are not intended to apply to a case like the present, where the plaintiffs bring a suit for the administration or partition of property in which, as is admitted by the defendants, they are entitled to a share, the extent of such share being in dispute. The motion must be dismissed with costs.—*Calcutta High Court, 1st April, 1873, Russick Lall Dey and others.*

Sec. 281 of Act VIII. of 1859 does not apply to the case of a plaintiff in custody for the costs of a suit.

A plaintiff having been unsuccessful in his suit was kept in custody for the costs of the defendant. He applied for his discharge under S. 281 of Act VIII. of 1859. Held (by Macpherson, J.), that S. 281 does not apply to such a case like this. The application was dismissed with costs.—*Calcutta High Court, 4th March, 1873, Eduljee Ruttonjee.*

Question of Limitation—Appellate Court.

Where a Court of first instance decides the issue of limitation in favor of plaintiff, and the Appellate Court without passing any judgment on the question of limitation,

remands the case for further investigation, it is competent to the Appellate Court, when the whole case comes before it, ultimately in appeal to try the question of limitation.—*28th February 1873, Niljadi, II., L. O., p. 54.*

Special Appeal lies to the High Court from the decision of a Subordinate Judge even in suits for recovery of rent below Rs. 100.—Sec. 102 of B. C. Act VIII. of 1869 does not apply.

Held, by JACKSON, J. (with him MITTER, J.), that S. 102 of B. C. Act VIII. of 1869 only relates to suits tried and decided originally or in appeal by the District Judge. The present case has been tried and decided, not by the District Judge, but by the Subordinate Judge. The objection taken (that the special appeal does not lie) therefore fails.—*Calcutta High Court, 26th February, 1873, Moonshree Mahomed Munoor Mea.*

Calcutta Small Cause Court has power to grant a second new trial of the same case.

COUCH, C. J.—It is reasonable and is in accordance with the practice of the Court in England to grant a new trial after a previous new trial, if it seems necessary for the ends of justice. There are instances in England in the common Law Courts and in the Courts of Equity where more than one new trial has been granted, it appearing

proper that it should be done. We think the same rule may be applied here. We must assume that the Judges of the Small Cause Court will not exercise this power unless it appears to them to be right to do so, and they have power to impose such terms as they may think reasonable. We think the question which has been referred to us must be answered in the affirmative, that it is competent to the Judges of the Small Cause Court to grant a second new trial in the same case.—*Calcutta High Court, 28th Feb. 1873, Purson Chund Golacha.*

Certificate under S. 9 of Act XXVI. of 1864 may be given at any time—if omitted by the Original Court, may be supplied by the Appellate Court.

COUCH, C. J.—An objection was taken that the decree being for a sum less than Rs. 1,000, the award of costs was erroneous, because there was no certificate under S. 9, Act XXVI. of 1864. Now a certificate under that Section may, according to the words of it, be given at any time. The words do not require that it should be given immediately. It says that costs shall not be allowed unless the Judge gives a certificate. The case, then, is that the learned Judge has made a decree for costs in express terms; he says "there will be a decree accordingly with costs on scale 2," but he has omitted to determine the question whether

"by reason of the difficulty, novelty or general importance of the case, the action was fit to be brought in the High Court." We think this is an omission which, the case having come before us in appeal, we are at liberty to supply; and if we consider that the action was fit to be brought in this Court, we may, acting as an Appellate Court, supply what has been omitted. We may determine any question which it was essential to determine, and may certify that it was a proper action to be brought in the High Court.—*Cal. High Court, 28th Feb., 1873, Nobo Coomar Doss.*

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Special Appeal lies to the High Court from the decree of an Additional Judge in suits for rent below Rs. 100.

JACKSON, J.—There was a preliminary objection in this case that no special appeal lay under S. 102 of Bengal Act VIII. of 1869. That section only refers to cases tried and decided by a District Judge. This case has been tried and decided by the Additional Judge.—*Calcutta High Court, 27th February 1873, Nobokristo Koondoo.*

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Evidence—Omission—Res-Judicata.

In a suit to hold certain lands on a mokurruree tenure, the Lower Appellate Court was of opinion that plaintiff would have established his case but for his omission, on former occasion when examined as a witness in a suit between third

parties, to make any mention of the mokurruree: *Held*, that the Judge had given undue importance to the omission which occurred under circumstances not naturally or necessarily calling for mention of the mokurruree; *held also*, that the fact of this mokurruree tenure when previously set up by this plaintiff in answer to a rent claim, having been disbelieved by the Collector, did not constitute a *res-judicata*, as between the parties with regard to the mokurruree right which the Collector had no jurisdiction to determine except incidentally.—3rd March 1873, *Meer Babur Ali, W. R., XIX., C. R., p. 217.*

No Right of Occupancy in Tanks.

THE CHIEF JUSTICE.—This tank appears to be used only for the preservation and rearing of fish. It does not appear to have formed part of any grant of land, or that it can in any way be considered as appurtenant to any land held. The only thing occupied appears to be the tank itself. *Held*, that the provisions of Act X. of 1859 are not applicable to such a tank as this is.—26th February 1873. *Shiboo Jalya, II., L. O., p. 53.*

Ijmalee Property—Joint Liability—Mesne Profits.

In a suit to recover possession of land from the *ijmalee* enjoyment of which plaintiff had been excluded by the joint action of all the defendants who had divided the property between themselves; *Held*,

that the defendants were all equally responsible for the damage sustained by the plaintiff, and that none of them could restrict their liability for mesne profits to that portion only of which they were in possession; *Held also*, that the plaintiff was entitled to obtain mesne profits up to such time as he should get real and substantial possession of the property at the hands of the defendants.—4th March 1873. *Ajoodya Doss, W. R., Vol. XIX., C. R., p. 218.*

A brother's daughter's son succeeds as heir, under the Mitáksharā, in the absence of nearer heirs.

COUCH, C. J.—The only question that remained was whether the plaintiff being a brother's daughter's son could inherit the property, and that is settled by the decisions of the Privy Council in the case of *Giridharilal Roy, versus The Govt. of Bengal* (1, B. L. R., P. C., p. 44) and of a Full Bench of this Court in *Amrita Kumari Debi, vs. Luckhinarrain Chuckerbutty* (2, B. L. R., F. B., p. 28), where it was held that the enumeration of *bandhus* in Art. 1, S. 6, C. 2 of the *Mitáksharā* is not to be considered exhaustive. That being so, there is no ground for saying that a brother's daughter's son cannot inherit in the absence of any nearer heir; and as it is not found in this suit that there is a nearer heir, the plaintiff is entitled to a decree.—7th Aug., 1872, *Musst. Doorga Beebe, X., B. L. R., p. 341.*

Suit for Contribution—Act XXXII. of 1839—Discretion of the Court in awarding interest.

A obtained a decree against B, C, and D; B paid the whole amount of the decree and sold his right of action to recover the two-thirds thereof from C and D to E. E brought a suit to recover the two-thirds of the decretal amount with interest thereon from the date of payment. *Held*, there was no contract between the parties to pay interest, and there is no rule of law by which, in the absence of such contract, an award of interest is made compulsory. It was within the discretion of the Court below either to give or to withhold interest.—*24th Jan. 1873. Bistoo Chunder Banerjee, X., B. L. R., p. 352.*

An application by a decree-holder for a review of judgment is not a proceeding to enforce his decree within Sec. 20 of Act XIV. of 1859 (vide Act IX. of 1871, Sch. I. No. 167.

In this case, the plaintiff obtained a decree on special appeal in the High Court in 1862, which affirmed the decrees of the Lower Courts under which the plaintiff had been declared entitled to a portion only of certain property claimed by him in the suit. The plaintiff made various applications for a review of the judgment of the High Court, all which applications failed, and, in June 1871, he applied in the Moonsiff's Court to execute the decree of 1862, *Held*,

it is impossible to construe the various applications for review, as proceedings to enforce the judgment of 1862, or any of the preceding judgments, or in the alternative, to keep the same in force. The object of those applications was distinctly to alter the judgment which had been obtained, and to procure a new judgment or decree to be passed. In common sense it cannot be said that an endeavour to obtain a new and a more favorable judgment is a proceeding to enforce or to keep alive the judgment which it is thus desired to supersede.—*21st Feb. 1873, Musst. Beebee Lutefan, X., B. L. R., p. 361.*

Execution—Trust Property.

Property put in the names of the sons in order that they should have the management of it, the father continuing the beneficial owner, is not liable to be taken in execution of a decree against the sons.—*7th March 1873, Moheput Singh, W. R., Vol. XIX., C. R., p. 226.*

Attachment of a Property in Suit.

There is nothing in the law to prevent the attachments in execution of a decree of a property which forms the subject of an existing suit between the present judgment-debtor and some other party.—*7th February 1873, Ram Chunder, Vol. II., L. O., p. 43.*

Execution—Costs—Litigation.

Having obtained possession of property in satisfaction of a decree,

the decree-holder had to meet proceedings initiated by a third party under Act VIII. of 1859, S. 230, and delayed to execute his decree as far as it related to costs: *Held*, that the proceedings in question could not be taken to keep alive the decree, or save limitation in respect to the costs.—*7th March 1873, Baboo Nath Jha, W. R., Vol. XIX., C. R., p. 226.*

Arrangement in Execution of a Decree.

Judgment-creditors having entered into an arrangement by mutual agreement with their judgment-debtors, cannot afterwards be allowed to execute their original decree in supersession of such arrangement.—*11th Feb. 1873, Chunder Nath Misser, II., L. O., p. 44.*

Execution-Sale—Postponements—

Proclamations—Act VIII. of 1859, Ss. 256, 257 and 259.

Where an execution-sale is postponed for short periods at the request of the judgment-debtors, on the distinct understanding, that the attachment and proclamation are to subsist and not to be renewed, no fresh proclamation is necessary. In adequacy of price does not affect the regularity of sale proceedings. If an application is made under Act VIII. of 1859, S. 256 on the ground of material irregularity, and such application and the objections are disallowed, it is the duty of the Court to pass an order confirming the sale which

has become absolute and to grant a certificate to the auction-purchaser under S. 259. A Court has no jurisdiction to reverse a sale on objections once over-ruled, and neither material nor causing substantial injury.—*11th March 1873, Baboo Hurdeo Narain Sahoo, W. R., Vol. XIX., C. R., p. 227.*

Survey Map—Declaratory Decree.

The holder of a decree which declares that the boundary line laid down in the survey map as the boundary line of the plaintiff's permanently-settled estate is not the true boundary line, is not entitled either to have the decree proclaimed on the spot or to have the line erased from the survey-map.—*24th Feb. 1873. Rajah Rajkissen Singh Bahadur, W. R., XIX., C. R., p. 232.*

Jurisdiction of Civil Courts—Act VIII. B. C. of 1869—Limitation in Suits to recover possession under a Zureepeshgee.

There should be no question in the mind of the Court as to which side of the Court is to entertain the suit or under what Act it is to be tried. It was one of the purposes of the Legislature, when it removed the cognizance of certain class of actions from the Collector's Courts to the Moonsiff's Courts, that there should no longer be any question whether the suitor had invoked the exercise of the right jurisdiction, and whether the Court was competent to do complete jus-

tice between the parties. It is the plain duty of the Court when a suit is brought before it to entertain it, and to endeavour to try the matter in question between the parties upon the whole merits. * * * *. Plaintiff having been ousted from a Ticca he held on a Zureepeshgee to be paid off by annual instalments sued for the recovery of possession with mesne profits. *Held*, that a transaction of this kind constitutes a different relation altogether between the parties from that ordinary relation of landlord and tenant, which is contemplated under the words used in Section 27, Act VIII. of 1869 B. C.—*17th Feb. 1873, Preyag Dutt Roy, II., L. O., p. 47.*

Execution Sale—Suit to reverse it.

One H, the owner of a jote, is said to have conveyed it to plaintiff by a deed duly registered; but plaintiff's name was not registered in the zemindar's serishtā. The zemindar sued the recorded jotedar H for arrears of rent; but H having left the country, one D (said to be in actual possession) was substituted and a decree passed. In execution the jote was sold, and it was purchased by one of the defendants. Plaintiff sued to set aside the sale, and for declaration of right and recovery of possession and obtained a decree in the Moonsiff's Court. The Subordinate Judge in appeal reversed the decree holding that plaintiff had no *locus standi* because he did not

choose to deposit the rent claimed or to give security and so stop the sale; *Held*, that there was no authority or countenance for this in the law.—*13th March 1873. Koonjo Beharee Roy, W. R., Vol. XIX., C. R., p. 230.*

A Zemindar knowingly purchasing a tenure already sold in execution of a Civil Court decree takes nothing.

MR. JUSTICE JACKSON.—The Judge altogether overlooks the fact that the zemindar well knew that plaintiff had acquired the tenure by purchase. Notwithstanding that knowledge, three years afterwards, he brought a suit for arrears of rent against a person whose interests he knew had become extinguished and obtained the sale of the tenure on the strength of an *ex parte* decree against such person. If it were necessary to decide the case on that point alone, it would be sufficient to say that the zemindar by such subsequent purchase in execution of a decree against a sold-out tenant had taken nothing and was bound to give way to a *bona-fide* purchaser like the plaintiff. More than that under the circumstances of the case, it is quite clear that the conduct of the zemindar is tainted with fraud. * * * * *. Under such circumstances if the sale under the rent decree had any validity and could prevail over the previous purchase made by the plaintiff, it would have been the duty of the Court to

order the zemindar to reconvey the tenure to the plaintiff, but as have already stated that is unnecessary as the zemindar took nothing by his purchase.—25th Feb. 1873, *Magon Mallo, II., L. O., p. 50.*

A decree against a person in his representative capacity cannot be executed against his own property.

A certain property having been sold in execution of a decree against Pooty Begum in her representative capacity, and it having been proved in a suit by her that the said property was her own; it was held that she was entitled to recover.—25th Feb. 1873. *Moharance Inderjeet Koonwar, II., L. O., p. 51.*

Suit for Confirmation of Possession
—*Declaratory Decree—Evidence.*

PRIVY COUNCIL.—Sheik Mahomed Afzul had three wives. By his wife Mussammut Wujeeha he had several children, namely, the appellant and the respondents in this suit. His wife Beebee Jan had no issue. Sheik Torab Ally, the appellant in this suit, claims to be entitled to certain property which he says belonged to Beebee Jan, who he says conveyed it to him by a bill of sale, and afterwards remitted to him the whole of the purchase-money, with the exception of a small portion which he paid off to a mortgagee. The respondents, his brothers and sisters, say that the property did not belong to Beebee Jan in her

own right, but that it was purchased by Mahomed Afzul, her husband, in her name benamee, for him; and consequently that upon his death, it became vested in the respondents and the plaintiff, as his heirs. *Held*, if the plaintiff meant that the Court should declare that the property belonged to Beebee Jan, it was necessary for him in a suit of this nature, in which he asked for an affirmation of his title, to show affirmatively how the property became vested in Beebee Jan, and out of whose money the property was purchased; that the plaintiff has not proved affirmatively that the property did belong to Beebee Jan in her own right. The appeal was dismissed with a declaration that the judgment and decree in this suit do stand without prejudice to any question of title between the parties in any future suit or proceeding.—*The 20th November 1872, Sheik Torab Ally, XIX., W. R., p. 1.*

Family Usage—Law of Succession
—*Lex Loci.*

PRIVY COUNCIL.—There is not any principle or authority for holding that in point of law a manner of descent of an ordinary estate, depending solely on family usage, may not be discontinued; as so to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom which is the *lex loci* binding on all persons within the local

limits in which it prevails. It is of the essence of family usages that they should be certain, invariable, and continuous, and well-established discontinuance must be held to destroy them.—26th Nov. 1872, *Rajah Rajkissen Singh, XIX., W. R., p. 8.*

Attorney's Costs—Lien on Sum recovered by Client—Attachment of Fund by Creditor.

The plaintiff obtained a decree against the defendant; but before satisfaction of the decree, the amount of the decree was attached in the hands of the defendant by a third person who had obtained a decree in a suit against the plaintiff. On an application by the attorney for the plaintiff that the defendant might be ordered to pay to him his costs of suit out of the sum which had been attached in the defendant's hands, and on which the attorney claimed to have a lien, the Court held that the attorney had a lien for his costs on the sum so attached, but that the only order it could make was an order to the defendant not to pay the sum attached to any one without notice to the attorney.—*Original Jurisdiction Calcutta High Court, 17th April 1873, Nawab Nazim of Bengal, X., B. L. R., p. 444.*

Small Cause Court Act (IX. of 1850), Secs. 58, 88—Jurisdiction—Goods and Chattels—Moveable Property—Tiled Huts.

Tiled huts are not "goods and

chattels" within the meaning of S. 58, Act IX. of 1858, and therefore cannot be taken in execution under that section.

Where tiled huts had been seized under a decree of the Small Cause Court, and a third party interpleaded under S. 88 of Act IX. of 1850, and claimed the huts, held that the Court, having no power to seize the huts, was right in dismissing the claim; that though it may seem hard that the claimant should be obliged to resort to a suit in order to establish his right, and to prevent his property being sold, that is the proper remedy. The bailiff, by seizing what the Warrant of the Small Cause Court could not authorize him to seize, has been guilty of an illegal act, a trespass for which he is liable to be sued, and for which he may have to pay such damages as the owner of the huts may have suffered in consequence.—*Calcutta High Court, 29th April 1873, Kally Persaud Singh, X., B. L. R., p. 448.*

Right of a Shareholder in Land to Measurement—Bengal Act VIII. of 1869, Secs. 25, 37, and 38.

A shareholder in a joint undivided estate cannot bring a suit under S. 37 of Bengal Act VIII. of 1869 for the measurement of his share.—*Calcutta High Court, 1873, March 7 and 15. Santiram Panjah, X., B. L. R., p. 397.*

Part IV.—INDIA COUNCIL ACTS.

vention of the provisions hereinbefore contained, shall be liable to fine not exceeding fifty rupees.

Where the tolls of such ferry have been let under the provisions hereinbefore contained, the whole or any portion of any penalty realized under this section or section fourteen may, at the discretion of the convicting Magistrate or Bench of Magistrates, be paid to the lessee.

16. All offences against this Act shall be heard

Officers by whom offences are triable. and determined by any Magistrate or

Bench of Magistrates, and any Magistrate or Bench of Magistrates having summary jurisdiction under chapter XVIII. of the Code of Criminal Procedure, shall try such offences in manner provided by that chapter.

Every Magistrate or Bench of Magistrates trying offences under this section may enquire into and assess the value of the damage (if any) done by the offender to the ferry concerned, and shall order the amount of such value to be paid by him in addition to any fine imposed upon him under this Act; and the amount so ordered to be paid shall be leviable as if it were a fine.

WHITLEY STOKES,

Secy. to the Govt. of India.

THE MADRAS CIVIL COURTS' ACT.

1873.

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ACT No. III. OF 1873.

PASSED BY THE GOVERNOR-GENERAL
OF INDIA IN COUNCIL.

*(Received the assent of the Governor
General on the 21st January
1873.)*

An Act to consolidate and amend
the law relating to the Civil Courts
of the Madras Presidency subordi-
nate to the High Court.

WHEREAS it is expedient to con-
solidate and amend
Preamble. the law relating to
the Civil Courts of the Madras
Presidency subordinate to the High
Court; It is hereby enacted as
follows :—

PART I.

PRELIMINARY.

1. This Act may be called
Short title. "The Madras Civil
Courts' Act, 1873":

It extends to all the territories
for the time being
Local extent. under the govern-
ment of the Governor of Fort St.
George in Council, except the
Tracts respectively under the juris-
diction of the Agents for Ganjam
and Vizagapatam;

And it shall come
Commence- into force on the first
ment. day of March 1873.

2. On and from that day the
enactments mention-
ed in the schedule
Repeal of on- hereto annexed shall
actments.

be repealed to the extent specified
in the third column of such sche-
dule.

PART II.

ESTABLISHMENT AND CONSTITUTION OF CIVIL COURTS.

3. The number of District
(heretofore designat-
ed Zila) Courts to be
established or con-
tinued under this Act, shall be
fixed, and may from time to time
be altered, by the Local Govern-
ment :

Provided that no increase to the
number of such Courts shall be
made by such Government without
the previous sanction of the Go-
vernor-General in Council.

4. The number of Subordinate
Judges and District
Munsifs to be ap-
pointed under this
Act for each District,
shall be fixed, and may from time
to time be altered, by the Local
Government :

Provided that no addition to the
number of such officers shall be
made by such Government without
the previous sanction of the Go-
vernor-General in Council.

5. The place at which any
Court under this Act
shall be held may be
fixed, and may, from
time to time, be altered,
in the case of a District Court
or a Subordinate Judge's Court, by
the Local Government,

in the case of a District Munsif's Court, by the High Court.

6. Whenever the office of the Judge of a District Court (hereinafter called a 'District Judge') or of a Subordinate Judge under this Act is vacant,

or whenever the Governor-General in Council has sanctioned an addition to the number of District Judges or Subordinate Judges under the provisions of section three or section four,

the local Government shall appoint to the office such duly qualified person as it thinks proper.

7. Whenever the office of a District Munsif under this Act is vacant,

or whenever the Governor-General in Council has sanctioned an addition to the number of District Munsifs under the provisions of section four,

the High Court shall appoint to the office such person as it thinks fit:

Provided that he possesses the qualifications for the time being required by the rules in this behalf which the High Court, with the previous sanction of the Local Government, are hereby empowered to make and alter.

Every appointment made under this section shall be published in the same manner as ap-

pointments made by the Local Government.

The Local Government may, for good and sufficient reason, annul any appointment made under this section.

8. The present Zila Courts, Principal Sadr Amins, and District Munsifs, shall be respectively the first "District Courts," "Subordinate Judges," and "District Munsifs" under this Act.

9. Every Court under this Act shall use a seal of such form and dimensions as are, for the time being, prescribed by the Local Government.

PART III.

JURISDICTION.

10. The Local Government shall fix, and may from time to time vary, the local limits of the jurisdiction of any District Judge or Subordinate Judge under this Act:

Provided that, where more than one Subordinate Judge is appointed to any district, the District Judge may assign to each such

Subordinate Judge the local limits of his particular jurisdiction within such district.

Appointment to vacancy in office of District Judge or Subordinate Judge.

Annulment of appointments.

Appointment to vacancy in office of District Munsif.

Local limits of jurisdiction of District Court or Subordinate Judge.

Local limits of jurisdiction of each of several Subordinate Judges.

Publication of appointments.

The present local limits of the jurisdiction of every Civil Court (other than the High Court) shall be deemed to have been fixed under this Act.

11. The High Court shall fix, and may from time to time modify, the local jurisdiction of District Munsifs.

12. The jurisdiction of a District Judge or a Subordinate Judge extends, subject to the rules contained in the Code of Civil Procedure, to all original suits and proceedings of a civil nature.

The jurisdiction of a District Munsif extends to all like suits and proceedings, not otherwise exempted from his cognizance, of which the amount or value of the subject-matter does not exceed two thousand five hundred rupees.

13. Regular or special appeals, or appeals under Madras Regulation XI. of 1832, section nine, shall, when such appeals are allowed by law, lie from the decrees and orders of a District Court to the High Court.

Appeals from the decrees and orders of Subordinate Judges and District Munsifs shall, when such appeals

are allowed by law, lie to the District Court, except when the amount or value of the subject-matter of the suit exceeds rupees five thousand, in which case the appeal shall lie to the High Court:

Provided that, whenever a Subordinate Judge's Court is established in any District at a place remote from the station of the District Court, the High Court may, with the previous sanction of the Local Government, direct that appeals from the decrees or orders of District Munsifs within the local limits of the jurisdiction of such Subordinate Judge be preferred in the Court of the latter:

Provided also, that the District Judge may remove to his own Court, from time to time, appeals so preferred, and dispose of them himself, or may, subject to the orders of the High Court, refer any appeals from the decrees and orders of District Munsifs, preferred in the District Court, to any Subordinate Judge within the District.

14. When the subject-matter of any suit or proceeding is land, a house or a garden, its value shall, for the purposes of the jurisdiction conferred by this Act, be fixed in manner provided by the Court Fees Act, 1870, section seven, clause v.

15. Every Court under this Act may require a witness or party to any suit or other proceeding pending in such Court to make such oath or affirmation as is prescribed by the law for the time being in force.

16. Where, in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution,

(a.) the Muhammadan law in cases where the parties are Muhammadans,

and the Hindu law in cases where the parties are Hindus, or

(b.) any custom (if such there be) having the force of law and governing the parties or property concerned,

shall form the rule of decision, unless such law or custom has, by legislative enactment, been altered or abolished.

(c.) In cases where no specific rule exists, the Court shall act according to justice, equity and good conscience.

17. No District Judge, Subordinate Judge or District Munsif, shall try any suit to or in which he is a party or personally interested, or shall adjudicate upon any proceeding

connected with, or arising out of, such suit.

No District Judge or Subordinate Judge, shall try any appeal against a decree or order passed by himself in another capacity.

When any such suit, proceeding or appeal comes before any such officer, he shall report the circumstances to the Court to which he is immediately subordinate.

The superior Court shall thereupon dispose of the case in the manner prescribed by the Code of Civil Procedure, section six.

Nothing in the last preceding clause of this section shall be deemed to affect the extraordinary original civil jurisdiction of the High Court.

PART IV.

MISCONDUCT OF JUDGES.

18. Any District Judge, Subordinate Judge, or District Munsif may, for any misconduct, be suspended or removed by the Local Government.

19. The High Court may, whenever it sees urgent necessity for so doing, suspend a Subordinate Judge pending the orders of the Local Government.

Power to require witness or party to make oath or affirmation.

Law administered by Courts to Natives.

Mode of disposing of such suits and appeals.

Judges not to try suits in which they are interested;

Suspension of Subordinate Judge by High Court.

The High Court shall immediately report the circumstances of such suspension,

and the Local Government shall make such order thereon as it thinks fit.

20. The High Court may suspend any District Munsif who is alleged to have misconducted himself, or may appoint a commission for enquiring into his alleged misconduct.

The provisions of Act No. XXXVII. of 1850 *(for regulating enquiries into the behaviour of public servants)* shall apply to enquiries under this section, the powers conferred by that Act on the Government being exercised by the High Court.

On receiving the report of the result of any such enquiry, the High Court may, if it think fit, remove the Munsif from office, or suspend him, or reduce him to a lower grade.

21. The District Judge may suspend from office, whenever he sees urgent necessity for so doing, any District Munsif under his control.

Whenever a District Judge exercises the power conferred by this section, he shall forthwith send to the High Court a full report of the circumstances of the

cases, together with the evidence, if any, and the High Court shall make such order thereon as it thinks fit.

PART V.

MINISTERIAL OFFICERS.

22. The Ministerial Officers of the District Courts shall be appointed, and may be suspended or removed, by the Judges of such Courts, whose orders in such matters shall be final.

23. The Ministerial Officers of the Courts of the Subordinate Judges and District Munsifs shall be appointed, and may be suspended or removed from office, by such Subordinate Judges and District Munsifs, respectively, subject to the approval or confirmation of the District Judge within whose jurisdiction such Courts are situate.

24. Every appointment under this Part shall be made subject to such rules as the Local Government from time to time prescribes on this behalf.

Every person appointed under this Part shall perform such duties as may from time to time be imposed upon him by the presiding officer of the Court to which he belongs.

Suspension of District Munsif by High Court. Commission of Inquiry.

Exercise by High Court of powers conferred on Government by Act XXXVII. of 1850.

Appointment, suspension or removal of Ministerial Officers of District Courts.

Appointment, &c., of Ministerial Officers of Subordinate Courts.

Rules regulating such appointments.

Suspension of District Munsif by District Judge.

Report to High Court.

Duties of Ministerial Officers.

The present Ministerial Officers of the Courts under this Act shall be deemed to have been appointed under this Part.

PART VI.

MISCELLANEOUS.

25. In the event of the death of the District Judge,

Temporary discharge of duties of District Judge. or of his being incapacitated by illness or otherwise for

the performance of his duties,

or of his absence from the station in which his Court is held,

the senior Subordinate Judge of the District shall, without interruption to his ordinary duties, assume charge of the District Judge's office, and shall discharge such of the current duties thereof as are connected with the filing of suits and appeals, the execution of processes and the like,

and shall continue in charge of the office until the same is resumed or assumed by an officer duly appointed thereto.

26. The District Judge, on the occurrence within

District Judge may nominate to vacancy in office of District Munsif. his district of any vacancy in the office of District Munsif

may, pending the orders of the High Court thereon, appoint such person as he thinks fit to act in such office;

and he shall at once report to the High Court the occurrence of

every such vacancy and such appointment.

27. Subject to the other provisions of this Act

District Judge to control Civil Courts of District. and to the rules for the time being in force and prescribed

by the High Court in this behalf, the general control over all the Civil Courts under this Act in any District is vested in the District Judge.

28. The Local Government may, by notification in the

Investiture of Subordinate Judge with Small Cause jurisdiction. official Gazette, invest, within such local limits as it shall from time to

time appoint,

any Subordinate Judge with the jurisdiction of a Judge of a Court of Small Causes for the trial of suits cognizable by such Courts up to the amount of rupees five hundred.

and any District Munsif with the same jurisdiction

Investiture of District Munsif with similar jurisdiction. up to the amount of rupees fifty,

and may, by like notification, whenever it thinks fit, withdraw such jurisdiction from the Subordinate Judge or Munsif so invested.

29. Section fifty-one of Act No. XI. of 1865 shall

Power to invest Small Cause Court Judge with powers of Subordinate Judge. be read as if, for the words "Principal Sudder Ameen," the words "Subordinate Judge" were substituted.

Part V.—BENGAL COUNCIL ACTS.

2. For section twenty-seven of the said Act XXI. of 1856, the following section shall be substituted :—

“27. Persons taking out licenses for the retail sale of spirituous and fermented liquors as aforesaid shall pay for every such license such fee, tax, or duty, as may from time to time be fixed with the sanction of the Board of Revenue ; or a fee, tax, or duty, adjusted or regulated in such manner and in accordance with such rules as the Board of Revenue may prescribe ; and such fee, tax, or duty, shall be specified in the license, and shall be payable in advance or at such periods as the said Board may direct. Any sale of spirituous or fermented liquors as aforesaid in less quantity than two imperial gallons or one dozen of quart bottles shall be held to be a retail sale.”

L. A. GOODEVE,

*Offg. Asst. Secy., Govt. of Bengal,
Judcl. and Legislative Depts.*

THE following Act passed by the Lieutenant-Governor of Bengal in Council, received the assent of His Honor on the 21st April 1873, and having been assented to by His Excellency the Governor-General on the 25th June 1873, is hereby promulgated for general information :—

Act No. IV. of 1873.

An Act for Registering Births and Deaths.

WHEREAS it is expedient to provide the means for a complete register of births and deaths ; It is hereby enacted as follows :—

The Lieutenant-Governor may at any time, by a notification published in the *Calcutta Gazette*, direct that all births and deaths, or all births, or all deaths, occurring within the limits of any area after

a certain date to be named in such notification shall be registered, and for that purpose may define the limits of such area.

From and after such date this Act shall apply to the whole of the area so defined.

2. The magistrate of the district may, for the purpose of such registration, divide any such area into such and so many dis-

Magistrate may divide area into districts, and may appoint registrars.

tricts as he may think fit, and may appoint one or more persons to be registrars of births or of deaths, or of births and deaths, within such district, and may at any time for sufficient reason dismiss any such registrar, and may fill up any vacancy in the office of registrar.

The magistrate shall cause to be published a list containing the name and place of office of every registrar in the area, and specifying the hours of the day during which such registrar shall attend at his office for the purpose of registration.

Magistrate to publish list of registrars.

3. Every registrar shall have an office within the district of which he is appointed registrar, and shall cause his name, with the addition of registrar of births (or of deaths, or of births and deaths, according to his appointment) for the district for which he is so appointed, and notice of the hours during which he will attend for the purpose of registration, to be affixed in some conspicuous place on or near the outer door of his office.

Every registrar to have an office in his district.

4. The magistrate shall cause to be prepared a sufficient number of register books for making entries of all births or deaths or both, according to such forms as the Lieutenant-Governor may from time to time sanction; and the pages of such books shall be numbered progressively from the beginning to the end; and every place of entry shall be also numbered progressively from the beginning to the end of the book; and every entry shall be divided from the following entry by a line.

Commissioners to have register books prepared and numbered.

5. Every registrar shall inform himself carefully of every birth, or of every death, or of both, according to his appointment,

Registrar to inform himself of, and register, births and deaths.

which shall happen in his district, and shall register, as soon as conveniently may be after the event, without fee or reward, the particulars required to be registered, according to the forms mentioned in the last preceding section, touching every such birth or every such death, as the case may be, which shall not have been already registered.

6. Every chokidar or other village watchman in any area to which this Act shall apply, or where there is no chokidar or other village watchman, such person as the magistrate may appoint, shall be required to report every birth or death occurring within his beat to such registrar and at such periods as the magistrate may direct. He shall obtain in writing if possible, and if it is impossible for him to obtain in writing, he shall obtain verbally, from any person who is bound to give information of the birth or death all particulars which are required to be known and registered, and he shall report such particulars to the registrar. Any chokidar or other village watchman or other person so appointed who

Chokidar to obtain particulars and to report to registrar.

Penalty for neglect.

wilfully or negligently refuses or omits to produce such writing, if any, or to report such birth or death, shall be punishable at the discretion of the magistrate with fine which may extend to two rupees.

7. The father or mother of every child born

Persons bound to give information of birth.

within such area, or in case of the death, illness, absence, or inability of the father and mother, the midwife assisting at the birth of such child, shall, within eight days next after the day of every such birth, give information, either personally or in writing, to the registrar of the district, or by means of the chokidar or other village watchman or other person as provided in the last preceding section, according to the best of his or her knowledge and belief, of the several particulars hereby required to be known and registered touching the birth of such child.

Penalty for neglect. Any person who refuses or neglects to give any information, which it is his duty to give under this section, shall be punishable at the discretion of the magistrate with fine which may extend to five rupees. Provided that not more than one person shall be punishable at the discretion of the magistrate for such refusal or neglect to give information.

8. The nearest male relative of the deceased present at the death, or in attendance during the last illness of any person dying within such area, or, in the absence of any such relative, the occupier of the house, or, if the occupier be the person who shall have died, some male inmate of the house in which such death shall have happened, shall, within eight days next after the day of such death, give information either personally or in writing to the registrar of the district, or by means of the chokidar or other village watchman or other person as provided in section 6, according to the best of his knowledge and belief, of the several particulars hereby required to be known and registered touching the death of such person. Provided that no person shall be bound to give the name of any female relative. Any person who refuses or neglects to give any information, which it is his duty to give under this section, shall be punishable at the discretion of the magistrate with fine which may extend to five rupees. Provided that not more than one person shall be punishable for such refusal or neglect to give information.

Persons bound to give information of death.

Penalty for neglect.

9. Any registrar who refuses or neglects to register any birth or death occurring within his district,

Penalty for registrar refusing to register.

which he is bound to register, within a reasonable time after he shall have been duly informed thereof, or demands or accepts any fee or reward or other gratification as a consideration for making such registry, shall be punishable at the discretion of the magistrate with fine which may extend to fifty rupees for each such refusal or neglect.

10. Whoever wilfully makes or causes to be made, for the purpose of being inserted in any register of births or deaths, any false statement touching any of the particulars required to be known and registered, shall be punishable at the discretion of the magistrate with a fine not exceeding fifty rupees.

11. In any place to which the District Municipal Improvement Act shall have been extended, the municipal commissioners may, if at a meeting specially convened for considering

Penalty for wilfully giving false information.

In a municipality under Act III. of 1864 the commissioners may arrange for keeping a register of births or deaths, or both.

such question, they shall so determine, arrange for keeping a register of all births, or of all deaths, or of all births and deaths occurring within the municipality. On and after a date to be fixed at such meeting, the commissioners shall in such case be authorized to provide out of the municipal fund for the employment of a sufficient number of registrars, and for the expenditure necessary for the maintenance of such registers, and shall exercise all the powers of a magistrate under this Act; and all the provisions of this Act shall be deemed to apply to such place.

12. The magistrate of a district may depute any subordinate magistrate to exercise the powers and to perform the duties vested in the magistrate by this Act, within such district or any part thereof.

Magistrate may depute a subordinate magistrate to discharge the functions of the magistrate.

L. A. GOODEVE,

*Offg. Asst. Secy., Govt. of Bengal,
Judcl. and Legislative Depts.*

Part I.—CIVIL RULINGS.

be allowed for the whole time against the persons in possession. That was in reality the same thing, but leaving the period for which each would be liable to be determined in the execution of the decree. Subsequently, the High Court appears from the proceedings to have declared that that was so, and Mr. Bagram, who represented Mr. Gasper, was declared to be separately liable for the rent of 1259 (1853). Although these persons were joined in the suit in this way, yet we must treat the decree as what it must have been by law, a decree against one person for the rent of one period, and a decree against the other person for the rent of another; and I think such a decree as this, although it is on one piece of paper, is in fact two decrees, a separate decree against each for the sum for which each is liable. When we come to apply to that the terms of Sec 20 of the law of limitation, there is really no difficulty; the decree is to be kept in force against each, and to be treated as a separate decree against each in such a case as this, as it would in the case of persons sued for contribution, because it is a separate liability, and each is liable only for his own share. I think that, although the decree is made in one suit, it is in reality and substance a separate decree against each for

the portion for which each is declared to be liable.

We must answer to the question* which is put to us that, in such a case as this, the proceedings are not sufficient to prevent the law of limitation applying to the other defendant.

CALCUTTA HIGH COURT.

The 3rd January, 1873.

PROSUNNO COOMAR GHOSE (*Defd.,*)
vs.

TARUCKNATH SIRCAR (*Plaintiff.*)

Absolute power of Hindoo Widow on property received by her as gift from her husband—Will—Disinheriting of Sons.

A Hindu died, leaving a widow, two sons (infants), and a daughter, and making a will of which the material part is:—"I give, devise, and bequeath unto my wife Sreemutty Luckhy Money Dossee and her heirs and assigns for ever all my real and personal estates and effects, and do appoint my said wife sole executrix of this my will." *Held*, that the husband gave to his wife absolute power of disposing of the property.

It is not necessary that there should be an express declaration of his desire or intention to disinherit his sons, if there is an actual gift to some other person expressed in clear and unequivocal words.

The facts of the case are as follows:—

* "Whether in the case of such a decree as was sought to be executed in this case, proceedings in execution against one of the defendants are sufficient to prevent the law of limitation applying to process of execution against the other."

The subject of dispute in this suit is certain property which originally belonged to one Hurronundo Sircar. The plaintiff and the defendant are both his grandsons; the plaintiff being the son of a son, while the defendant is the son of a daughter.

Hurronundo Sircar died in 1833, leaving a widow Luckhy Money Dossee, and two sons Shamachurn and Woomachurn, and a daughter Raymoney. Shamachurn died in 1849 without issue, but leaving a widow named Rampreosi Dossee, who died in 1855 or 1856. Woomachurn died in 1854, leaving one son, the plaintiff. Raymoney, the daughter of Hurronundo, is still alive, and the defendant Prosunno Coomur Ghose is her son.

Hurronundo Sircar made a will in English, which was apparently prepared by an English attorney, but which is signed by the testator in Bengali. It consists of only a few lines, and the following is the material part of it:—"I give, devise, and bequeath unto my wife Sreemutty Luckhy Money Dossee and her heirs and assigns for ever all my real and personal estates and effects, and do appoint my said wife sole executrix of this my will."

Luckhy Money in her life-time executed a deed of gift to the defendant Prosunno of a six-anna share of the family dwelling house which is the subject of this suit.

The plaintiff now seeks for a de-

claration that Luckhy Money did not, under the will of Hurronundo Sircar, become the absolute owner of the property, and that she had no right to alienate any portion of it, or to give to the defendant the six anna share of the dwelling house which she gave by the deed of the 18th October 1856. The plaintiff contended that although, according to the literal meaning of the words used in Hurronundo's will, the whole estate of Hurronundo Sircar was given to Luckhy Money absolutely, still, on the proper construction of the will, that is to say, if the will be construed not with reference to English law, but with reference to Hindu law, and to the habits and customs of the Hindus, the Court ought to hold that the will gave her no absolute interest, but merely appointed her to be trustee and manager of the estate for the benefit of the sons of the testator.

Macpherson, J. (before whom the case was originally tried) decreed the plaintiff's claim to recover the six-anna share of the dwelling-house, observing "I think that the plaintiff's contention is right. Considering that the will is the will of a Hindu; considering that he had at that time two infant sons; and considering that there is no expression or indication any where of a desire to disinherit his sons, and that there was no reason why he should desire to disinherit them, I think I must

assume that he did not mean to disinherit them, and that the will must be read as merely making over the property to the wife to be held by her in trust for the infant heirs."

From this decision the defendant appealed.

The judgment of the Appellate Court (consisting of Couch, C. J. and Markby, J.) was delivered by—

COUCH, C. J.—The suit is brought by Tarucknath Sircar who claims the whole of the property, and he asked that it might be declared that, under and by virtue of the will of Hurronundo Sircar, Luckhy Money Dossee had no power to devise the property included therein. Macpherson, J., made a decree in the plaintiff's favor, holding that the will of Hurronundo Sircar must be read as merely making over the property to the wife to be held by her in trust for the infant heirs. He says in his judgment "there is no doubt that the question which has been raised is one of great importance to Hindus, as bearing upon the question of the principles upon which the Courts ought to act in construing wills made by Hindus." I quite agree to this; but it appears to me that the principles upon which the Courts ought to act have been authoritatively determined, and in the present case we have only to apply them. In *Sreemutty Soorjee-money Dossee, vs. Denobundhoo*

Mullick,* the Judicial Committee say:—"The Hindu law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case, those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the country under which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption. These are, as we think, the principles by which we ought to be guided in determining the case before us; and we must first, therefore, consider what was the intention of the testator to be collected from the words of his will."

* 6, Moore's Indian Appeals, 526, at p. 550.

Although the will was signed by the testator in Bengali, I think it must now be assumed that it was explained to him, and that he understood its meaning. If it was not, and he did not understand what he was signing, there would be no question of construction, for it would not be his will. Probate of it was granted by the Supreme Court, and its validity has never been questioned. Macpherson, J., says he has no doubt the whole family thought that Luckhymoney was absolute owner of the property, and had the right to dispose of it at pleasure. It appears to me that the words of this will unequivocally show that it was the testator's intention that his wife should become the absolute owner of all his property. That is the meaning which the law has attached to the words he has used, and there is nothing in the language of the will to displace the assumption that he had regard to it; for the appointment of his wife as sole executrix is made with the view to complete the gift and enable her to obtain probate.

The surrounding circumstances are, as Macpherson, J., says, that the testator was a Hindu, and that he had at the time two infant sons, and there was no reason why he should desire to disinherit them. We cannot tell what reason he had for making a will, but the fact of his doing so shows, in my opinion, that he intended his wife

to be something more than a trustee and manager for the infant heirs as she would have been such if he had not made a will. It is not to be assumed that he made this will without reason: and if he, a Hindu, thought it right to make a will, it may well be that he thought he might leave to his wife to make a proper disposition of his property amongst his family. The learned Judge has declared her to be a trustee when the will contains no words whatever to create a trust. It is not, in my opinion, necessary that there should be an express declaration of his desire or intention to disinherit his sons, if there is an actual gift to some other person expressed in clear and unequivocal words, and I must respectfully dissent from the *dictum* of Phear, J., in the case* referred to by Macpherson, J. Nor can I agree with him in thinking that there is no indication of a desire to disinherit his sons. Allowing that a Hindu is less likely than any other person to disinherit his sons, it still appears to me that his desire and intention to do so may be shown as in the case of another person by the disposition he makes of his property.

Upon the construction which I think I must put upon this will, the point taken by the Counsel for the respondent, the plaintiff, that the property being the gift of a husband to his wife was inalien-

* B. L. R., Vol. X., p 271.

able, and on her death would descend to the heirs of the husband, does not arise. The husband has given to his wife an absolute power of disposing of the property which she has exercised. This was not an ordinary gift by the husband to his wife to which the authorities cited might apply.

I think, therefore, that the decree should be reversed, and the suit must be dismissed with costs on scale No. 2, including the costs of the appeal.

Appeal allowed.

CALCUTTA HIGH COURT.

The 30th August, 1866.

MEER SUJAD ALI KHAN NAWAB
ZOOLOFUKAR DOWLA BAHADOOR,
(Defendant,)
versus

LALLA KASHEENATH DOSS & others,
(Plaintiffs.)

Object of Cross-examination.

The essence of cross-examination is, that it is the interrogation by the advocate of one party of a witness called by his adversary with the object either to obtain from such witness admissions favorable to his case, or to discredit him.

This is a suit by Lalla Kasheenath, describing himself as a co-sharer and managing member of the firm of Kasheenath Doss and Benarussee Doss (now deceased), against Meer Sujad Ali Khan Zoofukar Dowla, for the sum of Rs. 9,681-7-6, on balance of an account for the price of buildings, works, and repairs alleged to have been executed by the plaintiff's firm at the defendant's request.

The effect of the defendant's answer is that his dealings were with Benarussee Doss only; that the plaintiff was not a partner of, or co-sharer with, and was not the heir of, Benarussee Doss; and that he had not obtained a certificate under Act XXVII. of 1860.

Secondly.—He pleaded that the suit was barred by limitation.

Thirdly.—He denied all liability, stating that the claim was a fraudulent one, and that books produced by the plaintiff had been manufactured for the purpose of supporting it.

Fourthly.—He said that Benarussee Doss, having acted as his cashier from 1269 to 1280, had received sums of money and jewels amounting to Rs 8,64,802, of which full details are given; that he had rendered no accounts, though repeatedly called on to do so; that there was a cash balance due from him for which the defendant was about to sue, when the plaintiff brought this suit in order to make it appear that there was a balance in his favor.

Lastly.—That the orders for all work such as those referred to were given by the defendant to Benarussee, not under any agreement or understanding that he was to be paid as a contractor, but as orders given to him as a servant, and the works were executed at the expense of the defendant.

The evidence was very fully and carefully taken on the 4th, 5th, 6th,

7th, and 8th of December 1865, before Baboo Koonj Lall Banerjee, Principal Sudder Ameen of the Twenty-four Pergunnahs, acting during the absence on deputation of Baboo Girish Chunder Ghose.

We observe, however, that Mahomed Jafur Ali Khan having stated in his examination-in-chief, as a witness for the defendant, that Benarussee Doss was Tuhbildar, and, without any doubt, servant of the defendant; that he did not know whether rupees, jewels, and clothes, were deposited with him; and that he used to carry out any orders given him by the defendant. He was asked by the plaintiff's vakeel, on cross-examination, "Do you know if he had similar dealings with other parties?" The question was disallowed by the Principal Sudder Ameen, on the ground that this was a plaintiff's question, but that the witness was not the plaintiff's witness. It is clear that the Principal Sudder Ameen was wrong in disallowing this question. It might have been of considerable importance to the plaintiff if he could have shewn that Benarussee was not a mere cashier of the defendant; that he received the defendant's money as he did that of any other person, and kept it merely as a banker.

The plaintiff's vakeel was fully justified in using all the arts of an advocate to extort admissions from the defendant's witnesses leading to that inference.

Similar questions were put to Moonshee Sufdar Ali, and disallowed for similar reasons.

* * * * *

Before we pass to the consideration of the general merits of the case, we will make some observations with reference to the disallowance of the questions above-mentioned.

The essence of cross-examination is, that it is the interrogation by the advocate of one party of a witness called by his adversary with the object either to obtain from such witness admissions favorable to his cause, or to discredit him. Cross-examination is the most effective of all means for extracting truth and exposing falsehood.

Sitting as a Court of Appeal, we have constantly to regret that witnesses have not been cross-examined in the Lower Courts in the most useful. An instance was recently brought to our notice, in which a Principal Sudder Ameen, having himself summoned a witness and examined him, refused to allow any question to be put to him by either of the parties to the cause. And in appeal to this Court, in consequence of the absence of material evidence on explanation which that witness could have given had a question been put to him, we were informed that the appellant was compelled to assent to a compromise.

Now, it is a well-known rule that all witnesses examined in-chief, or

sworn, are subject to cross-examination. The test for determining whether the depositions of witnesses who are absent, or who have been examined in a former suit, can be received, is, whether the party against whom they are to be used had the power to cross examine. If he could not have cross-examined, the deposition of the witness ought not to be admitted against him.

We think it not out of place to refer to a celebrated passage of Quintilian on the subject of cross-examination,* of which we have given a free translation. He says:—"In dealing with a witness who is to be compelled to speak the truth against his will, the greatest success consists in drawing out what he wishes to keep back. This can only be done by repeating the interrogation in greater detail. He will give answers which he thinks do not hurt his cause: and afterwards, from many things which he will have confessed, he may be led into such a strait that what he will not say, he cannot deny. For, as in an oration we generally collect scattered proofs, which singly do not appear to press on the accused, yet by being put together prove the charge. So a witness of this sort should be asked many things as to what went before,—what came after,—as to place, time, and persons, and other things, so that he may fall upon some answer after

which he must necessarily either confess what is desired, or contradict his former statements. If this does not happen it may become apparent that he will not speak, or he may be drawn out and detected in some falsehood foreign to the cause: or by being led on to say more than the matter requires in favor of the accused, the Judge may be led to suspect him, which will damage his cause not less than if he had spoken the truth against the accused. It sometimes happens that the testimony given by a witness is inconsistent with itself. Sometimes (and that is the more frequent case) one witness contradicts another. A skillful interrogation may produce by art that which usually happens accidentally. Apart from the cause, witnesses are usually asked many questions which may be useful, as to the lives of other witnesses, as to their own character and position, any crimes they have committed, their friendship or enmity to the parties,—in the answers to which they may either make some useful admission, or be detected either in a falsehood or the desire of injuring the opposite party."

The faculty of interrogating witnesses effectively is one which requires a careful study, and a considerable knowledge of human nature. It is one of the highest arts of an advocate, and can only be acquired after years of observation and experience. * * * * *

* The passage is quoted in *Best on Evidence*, p. 737.

PRIVY COUNCIL.

The 11th April, 1873.

RAJAH DEBENDRO NARAIN ROY,

versus

GOOMAR CHUNDER NATH ROY.

*Appeal from the Calcutta High Court.**Substantial ground requisite for impeaching the long title of an Auction-purchaser.*

When a property was sold in satisfaction of decrees which had been recovered affecting the estate of the deceased owner, and the proceeds applied among the decree-holders, the sale could not be held to have conveyed only the life-interest of his widow, although the sale was had under an attachment issued in the suit of certain mortgagees whose lien appears to have been created during her possession of the estate.

It is not necessary for their Lordships to express at any length the grounds on which they think that this appeal must be admitted. The plaintiff comes into Court to follow into the hands of the defendant, who by intermediate transfers has acquired the title of the purchaser at an auction-sale, which took place so long ago as the 10th June 1843, the property which was then sold. The grounds upon which he does this are, that the late Rajah Shib Prosaud Roy, who died sometime before the sale, was the undoubted owner of the property, that Rajah Shib Prosaud Roy left an Unnoo-muttee puttro, by which he authorised his widow to adopt a son; and that in the year 1856, then more 12 years after the sale, she exercised that power in favor of him, the plain-

tiff. However, nothing turns upon the point of time. His contention is that the sale must be taken to have been a sale of merely the widow's interest, and that upon her death, in the year 1865, his interest for the first time accrued, and that he was therefore entitled to commence this suit for the purpose of recovering the property in July 1868. The nature of the Unnoo-muttee puttro was peculiar, in that it did not leave the widow's estate to be defeated immediately by the adoption, as in the ordinary case, but gave to her in the event of an adoption, a life-interest in the property. Hence the interest of the appellant did not commence until the widow's death.

If this suit were successful, it certainly would be a flagrant instance of the extreme inconvenience which arises so often from the limited nature of a Hindoo widow's estate, and from the confusion which is introduced into the devolution of estates by authorities to adopt, which for a considerable time are not acted upon. But, of course, if the facts supported the contention of the appellant, it would be their Lordships's duty to apply the law without regard to such inconveniences or to the hardship upon the purchaser at the execution sale, and those who claim under him. It appears, however, to their Lordships that in this case there are no reasons whatever why they should apply that harsh law. If the only exe-

cution under which the property was sold, and the only liability which the proceeds of the sale were applied to satisfy, had been that incurred after the death of the Rajah Shib Prosaud Roy, in the proceedings taken ineffectually to contest the foreclosure of the mortgage, and the recovery of the mortgaged property, it might still be a question whether that were not a liability which bound the inheritance, in as much as it was incurred by the Court of Wards as representing the whole estate, and with the *bond fide* object of protecting the whole estate. It does not seem, however, to their Lordships, to be necessary to rest their decision upon that ground, since the view taken in the able judgment of the High Court affords a more satisfactory ground upon which to place it, that ground being that the property had, in fact, been also attached in satisfaction of decrees for other debts for which the estate of the Rajah was beyond all question liable; and that although the sale was had under the attachment issued in the suit of the mortgagees, the property was, in fact, sold in satisfaction of all the decrees that had been recovered affecting the property; the proceeds of the sale being paid in the usual way into the Collectorate, and there applied among the decree-holders, some of whom most unquestionably had subsisting and valued claims against the estate of the Rajah.

Under these circumstances, their

Lordships fully concur with the High Court in thinking that the appellant has no substantial ground upon which he can impeach the long title acquired by the respondent under the execution sale. It is, therefore, wholly unnecessary for their Lordships to consider whether the evidence supports the conclusion of the High Court upon the question, whether Anund Moyo Dabea had abandoned the world before her death, or whether the Court of first instance was correct in holding that that case had not been established.

Their Lordships must humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal. The costs, of course, ought to follow the result.

PRIVY COUNCIL.

The 4th, 5th, 6th & 27th July, 1872.

MOLLWO, MARCH, AND OTHERS,
(*Plaintiffs*) *Appellants*,

versus

THE COURT OF WARDS, ON BEHALF
OF THE ESTATE OF RAJAH PERTAUB
CHUNDER SINGH, (*Defendant*)
Respondent.

*Appeal from the Calcutta High
Court.*

*Partnership—English Law—What
constitutes a Partner.*

In applying the English law of partnership to cases in India the usages of trade and habits of business of the people of India, so far as they may be peculiar and differ from those in England, ought to be borne in mind.

It appears to be now established that, although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such participation alone, it may, as a presumption, not of law but of fact, be inferred, yet that, whether that relation does or does not exist, must depend on the real intention and contract of the parties.

Where a man holds himself out as a partner, or allows others to do it, he is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel. Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract.

To constitute a partnership, the parties must have agreed to carry on business, and to share profits in some way in common ; but where a contract is entered into between partners and a third person for the protection of that person as a creditor, whereby it is agreed that he shall receive in consideration of advances commission on the net profits of the partnership business, and large powers of control over the business are given to him, but no power to direct transactions, the Court, if satisfied that the contract was one of loan and security, will not interpret it as constituting a partnership.

If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability ; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character.

The action which gives occasion to this appeal was brought by the plaintiffs (the appellants), merchants of London, against the late Rajah Pertab Chunder Singh, to recover a balance of nearly three lakhs of rupees, claimed to be due to them from the firm of W. N. Watson and Co., of Calcutta. The Rajah having died during the pendency of the suit, the defence was continued by the respondents, the Court of Wards, on behalf of his minor heir.

The plaint alleged that the firm of W. N. Watson and Co. consisted of William Noel Watson, Thomas Ogilvie Watson, and the Rajah, and sought to make the Rajah liable as a partner in it.

It may be assumed, although the exact amount is a question in dispute in the appeal, that a large balance became due from the firm to the plaintiffs during the time when it is contended that the Rajah was in partnership with the two Watsons.

The questions in the appeal depend, in the main, on the construction and effect of a written agreement entered into between the Watsons and the Rajah ; but it will be necessary to advert to some extrinsic facts to explain the circumstances under which it was made and acted on.

The two Watsons commenced business in partnership, as merchants, at Calcutta, in 1862, under the firm of W. N. Watson and Co. Their transactions consisted prin-

essentially of making consignments of goods to merchants in England, and receiving consignments from them. In January 1863, they entered into an agreement with the plaintiffs regulating the terms on which consignments were to be made between them, and under which W. N. Watson and Co. were authorized, within certain limits, to draw on the plaintiffs in London against consignments. The Watsons had little or no capital. The Rajah supported them, and in 1862 and 1863 he made large advances to enable them to carry on their business, partly in cash, but chiefly by accepting bills, for which the Watsons obtained discount, and which the Rajah met at maturity. In the middle of 1863, the total amount of these advances was considerable, and the Rajah desired to have security for his debt, and for any future advances he might make, and also wished to obtain some control over the business by which he might check what he considered to be the excessive trading of the Watsons. Accordingly, an agreement was entered into on the 27th August 1863, between the Rajah of the one part, and "Messrs. W. N. Watson and Co.," of the other part, by which, in consideration of money already advanced, and which might be thereafter advanced by the Rajah to them, the Watsons agreed to carry on their business subject to the control of the Rajah in se-

veral important particulars which will be hereafter adverted to. They further agreed to, and in fact did, hand over to him "as security" the title-deeds of certain tea plantations, and they also agreed that "as further security" all their other property, landed or otherwise, including their stock-in trade, should be answerable for the debt due to him. The 10th and 13th clauses of the agreement were as follows:—"10th. —In consideration of the said advances made and the liability incurred as aforesaid by the Rajah, and in consideration of any future advances which may be made by him, the firm agrees that he shall receive from them a commission of 20 per cent. on all net profits made by the firm from time to time, commencing from the 1st May 1862, or until such time as the whole amount of the debt due to him shall be paid off, and the liability so incurred by him as aforesaid shall be wholly extinguished." "13th. —The firm shall, in addition to the said commission, pay to the Rajah interest at the rate of 12 per cent. per annum upon all cash advances which have been or are to be hereafter made by him to the firm, and shall also pay to the banks all discount and interest now or hereafter payable on the said acceptances." This agreement is not signed by the Rajah, but he was undoubtedly an assenting party to it. Subsequently to the agreement the Rajah

made further advances, and the amount due to him ultimately exceeded three lakhs of rupees. In 1864 and 1865, the firm of W. N. Watson and Co. fell into difficulties. An arrangement was then made under which the Rajah, upon the Watsons executing to him a formal mortgage of the tea-plantations to secure the amount of his advances, released to them, by a deed bearing date the 3rd March 1865, all right to commission and interest under the agreement of August 1863, and all other claims against them. In point of fact, the Rajah up to this time had never received possession of any of the property or moneys of the firm, nor any of the proceeds of the business, and did not in fact receive any commission. A sum of 27,000 rupees on this account was, indeed, on the 30th September 1863, placed to his credit in the books of the firm in a separate account opened in his name, but the sum so credited was never paid to him, and was subsequently "written back" by the Watsons. Some evidence was given as to the extent of the interference of the Rajah in the control of the business. It seems the Rajah knew little of its details, and it is unnecessary to go, with any minuteness, into the facts on this part of the case; for it was conceded that the Rajah availed himself only in a slight degree of the powers of control conferred upon him by the agreement; in fact,

that he did not more, but much less, than he might have done under it, so that the question really turns on the effect of the contract itself. The subsequent acts of the Rajah do not in any way add to or enlarge his liability.

Before proceeding to the main questions which have been argued in the appeal, it may be as well to clear the way for their consideration by saying that no liability can in this case be fastened upon the Rajah on the ground that he was an ostensible partner, and therefore liable to third persons as if he was a real partner. It is admitted that he did not so hold himself out; and that a statement made by one of the Watsons to the plaintiffs, to the effect that he might be in law a partner, by reason of his right to commission on profits, was not authorized by the Rajah. The liability therefore of the Rajah for the debts contracted by W. N. Watson and Co. must depend on his real relation to that firm under the agreement.

It was contended, for the appellants, that he was so liable:

1. Because he became by the agreement, at least as regards third persons, a partner with the Watsons; and

2. Because, if not "a true partner" (the phrase used by Mr. Lindley in his argument), the Watsons were the agents of the Rajah in carrying on the business; and the debt to the plaintiffs was contract-

ed within the scope of their agency.

The case has been argued in the Courts of India and at their Lordships' box, on the basis that the law of England relating to partnerships should govern the decision of it. Their Lordships agree that, in the absence of any law or well-established custom existing in India on the subject, English law may properly be resorted to in mercantile affairs for principles and rules to guide the Courts in that country to a right decision. But whilst this is so, it should be observed that in applying them, the usages of trade and habits of business of the people of India, so far as they may be peculiar and differ from those in England, ought to be borne in mind.

The agreement, on the face of it, is an arrangement between the Rajah, as creditor, and the firm consisting of the two Watsons, as debtors, by which the Rajah obtained security for his past advances; and in consideration of forbearance, and as an inducement to him to support the Watsons by future advances, it was agreed that he should receive from them a commission of 20 per cent. on profits, and should be invested with the powers of supervision and control above referred to. The primary object was to give security to the Rajah as a creditor of the firm. It was contended at the bar that, whatever may have been the intention, a par-

ticipation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation, unless rebutted by other circumstances. It appears to their Lordships that the rule of construction involved in this contention is too artificial, for it takes one term only of the contract and at once raises a presumption upon it, whereas the whole scope of the agreement, and all its terms, ought to be looked at before any presumption of intention can properly be made at all.

It certainly appears to have been at one time understood that some decisions of the English Courts had established, as a positive rule of law, that participation in the net profits of a business made the participant liable as a partner to third persons. (See this pointedly stated by Blackburn, J., in *Bullen, versus Sharp*).* The rule had been laid down with distinctness by Eyre, C. J., in *Wangh, v. Carver*,† and the reason of the rule the Chief Justice thus states:—"Upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of *Grace, v. Smith*‡ and I think it stands upon fair

* L. R., 1, C. P., 86, see 100.

† 2, H. Bl., 235, see 247.

‡ 2, W. Bl., 298.

grounds of reason." The rule was evidently an arbitrary one, and subsequent discussion has led to the rejection of the reason for it as unsound. Whilst it was supposed to prevail, much hardship arose from its application, and a distinction, equally arbitrary, was established between a right to participate in profits generally "as such," and a right to a payment by way of salary or commission "in proportion" (to use the word of Lord Eldon) "to a given quantum of the profits." This distinction was stated to be "clearly settled" and was acted upon by Lord Eldon in *Ex parte Hamper** and in other cases. It was also affirmed and acted on in *Pott, versus Eytou*,† where Tindal, C. J., in giving the judgment of the Court, adopts the rule as laid down by Lord Eldon, and says:—"Nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as agent, or commission on sales." The present case appears to fall within this distinction. The Rajah was not entitled to a share of the profits "as such"; he had no specific property or interest in them *qua* profits, for, subject to the powers given to the Rajah by way of security, the Watsons might have appropriated or assigned the whole profits without any breach of the agreement. The Rajah was enti-

tled only to commission, or a payment equal in proportion to one-fifth of their amount. This distinction has always been admitted to be thin, but it may be observed that the supposed rule itself was arbitrary in the sense of being imposed by law and of being founded on an assumption opposed in many cases to the real relation of the parties; and when the law thus creates a rule of liability and a distinction, both equally arbitrary, the distinction which protects from liability is entitled to as much weight as the rule which imposes it.

But the necessity of resorting to these fine distinctions has been greatly lessened, since the presumption itself lost the rigid character it was supposed to possess after the full exposition of the law of this subject contained in the judgment of the House of Lords in *Cox, versus Hickman** and the cases which have followed that decision. It was contended that these cases did not over-rule the previous ones. This may be so, and it may be that *Waugh, v. Carver*† and others of the former cases, were rightly decided on their own facts; but the judgment in *Cox, v. Hickman*‡ had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by

* 17, Ves., 303, see 412.

† 3, C. D., 32.

* 8, H. L. C., 268.

† 2, H. BL, 235.

‡ 8, H. L. C., 268.

which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. It appears to be now established that, although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such participation alone, it may, as a presumption, not of law but of fact, be inferred, yet that, whether that relation does or does not exist, must depend on the real intention and contract of the parties.

It is certainly difficult to understand the principle on which a man who is neither a real nor ostensible partner can be held liable to a creditor of the firm. The reason given in *Grace, v. Smith*,* that by taking part of the profits he takes part of the fund which is the proper security of the creditors, is now admitted to be unsound and insufficient to support it; for of course the same consequences might follow in a far greater degree from the mortgage of the common property of the firm, which certainly would not of itself make mortgagee a partner. Where a man holds himself out as a partner, or allows others to do it, the case is wholly different. He is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting

may be rightly held liable as a partner by estoppel. Again, wherever the agreement between parties creates a relation which is in substance a partnership, no mere words or declarations to the contrary will prevent, as regards third persons, the consequences flowing from the real contract.

Numerous definitions by text writers of what constitutes a partnership are collected at the end of the introduction to Mr. Lindley's excellent treatise on this subject. Their Lordships do not think it necessary to refer particularly to any of them, or to attempt to give a general definition to meet all cases. It is sufficient for the present decision to say, that to constitute a partnership, the parties must have agreed to carry on business, and to share profits in some way in common.

It was strongly urged, that the large powers of control, and the provisions for empowering the Rajah to take possession of the consignments and their proceeds, in addition to the commission on net profits, amounted to an agreement of this kind, and that the Rajah was constituted, in fact, the managing partner. The contract undoubtedly confers on the Rajah large powers of control. Whilst his advances remained unpaid, the Watsons bound themselves not to make shipments or order consignments, or sell goods without his consent. No money was to be drawn from

* 2, W. Bl., 998.

the firm without his sanction, and he was to be consulted with regard to the office business of the firm, and he might direct a reduction or enlargement of the establishment. It was also agreed, that the shipping documents should be at his disposal, and should not be sold or hypothecated, or the proceeds applied without his consent; and that all the proceeds of the business should be handed to him, for the purpose of extinguishing his debt. On the other hand, the Rajah had no initiative power; he could not direct what shipments should be made or consignments ordered, or what should be the course of trade. He could not require the Watsons to continue to trade, or even to remain in partnership; his powers, however large, were powers of control only. No doubt he might have laid his hands on the proceeds of the business; and not only so, but it was agreed that all their property, landed and otherwise, should be answerable to him as security for his debt. Their Lordships are of opinion that by these arrangements the parties did not intend to create a partnership, and that their true relation to each other under the agreement was that of creditor and debtors. The Watsons evidently wished to induce the Rajah to continue his advances, and, for that purpose, were willing to give him the largest security they could offer; but a partnership was not contemplated,

and the agreement is really founded on the assumption, not of community of benefit, but of opposition of interests. It may well be that, where there is an agreement to share the profits of a trade, and no more, a contract of partnership may be inferred, because there is nothing to show that any other was contemplated; but that is not the present case, where another and different contract is shown to have been intended; viz., one of loan and security.

Some reliance was placed on the Statute 28 and 29 Vict., c. 86, which exacts that the advance of money to a firm upon a contract that the lender shall receive a rate of interest varying with the profits, or a share of the profits, shall not, of itself, constitute the lender a partner, or render him responsible as such. It was argued that this raised an implication that the lender was so responsible by the law existing before the passing of the Act. The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shown to be different from that which the Legislature supposed it to be, the implication arising from the Statute cannot operate as a negation of its existence. What may be the effect of the positive enactment contained in the fifth clause of the Act, so far as regards England, it is not necessary for their Lordships to consider. The

Indian Act XV. of 1866, passed after this contract was made, does not contain that provision.

It was strongly insisted for the appellants that if "a true partnership" had not been created under the agreement, the Watsons were constituted by it the agents of the Rajah to carry on the business, and that the debt of the plaintiffs was contracted within the scope of their agency.

Of course, if there was no partnership, the implied agency which flows from that relation cannot arise, and the relation of principal and agents must, on some other ground, be shown to exist. It is clear that this relation was not expressly created, and was not intended to be created by the agreement, and that, if it exists, it must arise by implication. It is said that it ought to be implied from the fact of the commission on profits, and the powers of control given to the Rajah. But this is again an attempt to create, by operation of law, a relation opposed to the real agreement and intention of the parties, exactly in the same manner as that of partners, was sought to be established, and on the same facts and presumptions. Their Lordships have already stated the reasons which have led them to the conclusion that the trade was not agreed to be carried on for the common benefit of the Watsons and the Rajah, so as to create a partnership; and they think there

is no sufficient ground for holding that it was carried on for the Rajah, as principal, in any other character. He was not, in any sense, the owner of the business, and had no power to deal with it as owner. None of the ordinary attributes of principal belonged to him. The Watsons were to carry on the business; he could neither direct them to make contracts, nor to deal with particular customers, nor to trade in the manner which he might desire: his powers were confined to those of control and security, and subject to those powers, the Watsons remained owners of the business and of the common property of the firm. The agreement in terms, as their Lordships think, in substance is founded on the relation of creditor and debtors, and establishes no other.

Their Lordships' opinion in this case is founded on their belief that the contract is really and in substance what it professes to be, viz. one of loan and security between debtors and their creditor. If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties

according to their true and real character.

For the above reasons their Lordships think that the Judges of the High Court, in holding that the Rajah was not liable for the debts of the firm of W. N. Watson and Co., took a correct view of the case; and they will, therefore, humbly advise Her Majesty to affirm their judgment, and to dismiss this appeal with costs.

CALCUTTA HIGH COURT.

The 22nd June, 1867.

MR. J. J. DOYLE, MANAGER ON BEHALF OF THE BENGAL INDIGO COMPANY, (*Plaintiff*),

versus

DWARKA NATH CHATTERJEE AND ANOTHER, (*Defendants*.)

Attempt to execute the Decree of a Court having no jurisdiction—Damages.

A decree passed by a Court having no jurisdiction cannot be executed. A plaintiff attempting to execute a decree in a case in which the Court had no jurisdiction, is liable to be sued in an action for damages for executing the decree.

Reference to the High Court by Mr. C. D. Field, Officiating Judge of the Principal Court of Small Causes at Kishnaghur.

CASE.—This was an action for damages brought by the Bengal Indigo Company against Dwarka Nath and Ohit Kaze. The damages alleged was that defendants had made excavations in the plaintiff's land and used a quantity of the soil for the manufacture of bricks.

The defendants pleaded the orders of Judoonath Sen, an Assistant Overseer in the Public Works Department. It does not appear from the record that any evidence was taken in support of this plea, or to show that the above defendants acted on such orders without knowing that they were doing a wrongful act. Summonses were, however, issued against Judoonath Sen and Government, who were thus made parties to the suit. The summons in the case of the latter was served on the Government pleader who entered an appearance and pleaded *non-liability*. This plea was overruled by the former Judge, Baboo Dborga Prosaud Ghose, and a decree passed against Judoonath Sen and Government in the following terms:—"Decreed for Rupees 28-15-9 with costs proportionately, and interest at 12 per cent. against Government and Judoonath Sen."

Execution of this decree against Government is now applied for, and the decree was given on the 13th December 1865, or after the passing of Act XI. of 1865, Section 9 of which is as follows:—"Suits against the local Government or against the Government of India shall be brought in the Court having jurisdiction at the place which is the seat of such Government."

With advertence to this Section of the Small Cause Court Act for the Mofussil, it is clear that the Court of Small Causes at Kishnaghur had no jurisdiction to pass a

decree against Government. The question which I then beg to submit for the decision of the High Court under the provisions of Act X. of 1867 is, whether I should now grant execution of the above decree against Government.

The question being one of jurisdiction, I conceive that it is incumbent on me to enter into it of my own motion, as the defect is plainly apparent on the face of the judgment (*vide* the remarks of the Court in case No. 2220 of 1865, Kisto Chunder Chuttopadhia and others, Appellants, *versus* Ramlochan Roy and others, Respondents, 16th December 1865, IV., Weekly Reporter, Act X. Rulings, p. 47; and case No. 494 of 1865, Anund Coomar, Appellant, *versus* Takur Pandey, Respondent, 20th December 1865, IV., Weekly Reporter, Miscellaneous Appeals, p. 21.)

Under English Law, a judgment (even a judgment *in rem.*) can be impeached by extrinsic evidence showing that the Court which pronounced it had no jurisdiction (Havelock, *vs.* Rockwood, 8, T. R., 268); *see* also Smith's Leading Cases, Vol. II., pp. 659, 684, 686, 694. Mr Taylor lays it down (Work on Evidence, Vol. II., para. 1523) that every species of judgment will be rendered inadmissible in evidence by showing that the Court from which it emanated had no jurisdiction, and it will be abundantly clear from the cases quoted by him in paragraphs 1523 to 1532

that it has been the practice in England to quash or otherwise treat as nullities the judicial proceedings of inferior tribunals held without jurisdiction (para. 1525.)

In case No. 211 of 1865 Bhowani Prosaud Surma Khan, Appellant, *versus* Dharm Narain Neogy and others, Respondents, 16th May 1865, III., Weekly Reporter, Civil Rulings, p. 25, the High Court set aside an order passed by a Principal Sudder Ameen without jurisdiction in a case of that class cognizable by Courts of Small Causes.

For the above reasons, I am of opinion that execution of the present decree against Government ought to be refused, and that so much of the judgment as makes Government liable ought to be treated as a nullity.

In a case somewhat similar which I had the honor to refer to the High Court before the passing of Act X. of 1867, and which is reported at pages 19 and 20, V., Weekly Reporter, Small Cause Court References, I quoted some decisions of the old Sudder Court and of the present High Court which may not be inapplicable to the present case.

The case was instituted on the 23rd August 1865, that is *after* Act XI. of 1865 came into operation.

This Act was passed on the 15th March 1865, and no date being fixed by the Act for the commencement of its operation, it had effect from the date of being passed.

The judgment of the High Court was delivered as follows by:—

PEACOCK, C. J.—It is necessary in a suit in an inferior Court to show that the Court has jurisdiction. In this case it is contended that the High Court cannot take judicial notice of what is the seat of the Bengal Government. Admitting that to be the case for the sake of argument, it was necessary for the plaintiff to show that the seat of Government was within the jurisdiction of the Small Cause Court of Kishnaghur. If the Court should attempt to execute the decree in a case in which the Court had no jurisdiction, the plaintiff who applied for that execution would be liable to be sued in an action for damages for executing the decree.—*See Saunders' 1st Vol. 71a, Note 1, the King, versus Danser, 6, Term Reports, 245.*

As this suit was commenced after Act XI. of 1865 came into operation, the Small Cause Court at Kishnaghur had no jurisdiction, and the Judge ought to refuse to execute the decree.

CALCUTTA HIGH COURT.

The 28th June, 1873.

Case No. 1545 of 1872 decided by a single Judge.

NOBIN CHUNDER MODAFURASH,

versus

RAM NARAIN MITTER.

Baboo Gopal Lall Mitter for the Respondent.

Notice to quit—Value of property to be given to tenant as provided in the pottah.

Where there is a covenant in the pottah to the effect that the tenant shall not be ejected excepting upon payment of the value of the property, put upon the land by the tenant, and where the tenant began to construct a building and to carry it on after having received the notice to quit, it was held that a building constructed under those circumstances does not fall within the meaning of the covenant.

PHEAR, J.—No good ground of special appeal appears to me to have been made out. The learned Pleader for the appellant has very frankly said, that the chief ground on which he relies is the proposition that his client cannot rightly be ejected by the plaintiff excepting upon payment of the value of the property, which has been put by him upon the land. And no doubt it does appear that in the pottah there is a covenant to that effect. But Baboo Gopal Lall for the respondent has stated that it is alleged in the plaint itself, and no where denied by the defendant, that at the time when the notice to quit was given, there was no house erected upon the land, and that the defendant began the construction of the house and continued to carry it on after having received the notice to quit, which is the foundation of this suit, and during the proceeding of this suit.

This being so. I think that a building constructed under those circumstances does not fall within the meaning of the covenant in the lease.

Part II.—CRIMINAL RULINGS.

Evidence Act (I. of 1872,) Sec. 30 and Sec. 183—Confession of one Prisoner when admissible against another—Accomplice—Corroborative Evidence.

The evidence of an accomplice cannot be safely acted upon as against persons accused by him excepting when it is corroborated in regard to the particulars which implicate them. The corroboration which is needed should be corroboration derived from evidence which is independent of accomplices, which is not vitiated by the accomplice-character of the witness not affected, namely, by the disposition on the part of one whose guilt is disclosed to purchase impunity or advantage by falsely accusing others; and further should be such as to support that portion of the accomplice's testimony which makes out that the prisoner was present at the time when the crime was committed, and participated in the acts of commission.

The statement of a prisoner may be every word of it taken and acted upon as against himself, but it is only admissible against the others whether for the purpose of corroboration of an accomplice's testimony, or otherwise so far as it is made available by Sec. 30 of the new Evidence Act; which Section must be interpreted to mean that the statement of fact made by the prisoner which amounts to a confession of guilt on his part may be

taken into consideration, so far and so far only as that particular statement of fact itself extends against the other prisoners who are being tried as well as himself for the offence which is thus confessed.—*Calcutta High Court, 23rd January, 1873, Mohesh Biswas, X., B. L. R., p. 455.*

Charge of a Judge to a Jury—How to sum up the Evidence—Verdict of Jury—Criminal Procedure Code (Act X. of 1872).

The use of such terms as "Do you believe this"? "Can you believe that"? while giving charges to a Jury is very objectionable. The Jury should be left to judge of the evidence and to decide what weight is to be attached to it.

It is not in every case in which there has been a misdirection to the Jury that the High Court will set aside a verdict of guilty, but only in such cases in which the accused has been materially prejudiced, or where there has been a failure of justice.

In putting a case to a Jury, it is most useful that the Judge should state to the Jury in the narrative form so much of the facts as are admitted on both sides. But when he has reached this point he should explain distinctly the issues of fact which it remains for the Jury to determine having regard to that part of the case which is admitted

and to the charges upon which the prisoners are tried; and, having made the Jury understand these issues, the more convenient mode of summing-up for him to adopt is to present to the Jury as clearly and impartially as he can a summary of the evidence and the considerations and inferences to be drawn from the evidence, as they bear both on the negative and affirmative sides of each of these issues. It is impossible of course for any Judge to state every item of evidence, or to draw the attention of the Jury to every fact which has been deposed to, but he can, without difficulty, give them a summary of the leading points of the evidence and the considerations and inferences to be drawn from it on the one side and on the other. He may if he thinks fit, under the last Clause of Sec. 256, at the same time express to the Jury his own opinion as to the facts; but that is a very different thing indeed from that which the Sessions Judge has done in this case. The Judge has not simply expressed his opinion, and then left all the evidence fairly before the Jury on the one side, and on the other, for them to judge of it by the aid of his opinion if they chose to avail themselves of it. But he has endeavoured, from first to last, to persuade the Jury to take the particular view of the facts and of the inferences from the evidence which he himself has taken and drawn, and indeed he

has left them no loop-hole for taking any other view. This is not only not in accordance with the enactment of the Code of Criminal Procedure but it is a course calculated in the *Mossussil* to withdraw altogether from the Jury the actual decision of the case.—*Calcutta High Court, 29th and 30th April, 1873, Raj Coomar Bose, X., B. L. R., App., p. 36.*

CALCUTTA HIGH COURT.

The 31st January, 1873.

THE QUEEN, vs. TARUCKNATH
MOOKERJEE.

Criminal Procedure Code (Act X. of 1872) Sec. 296.—Powers of a Court of Sessions or Magistrate of the District to direct an accused person to be committed for trial who has been improperly discharged by a Subordinate Court.

An order of a Judge under Section 296 of Act X. of 1872 directing a Magistrate to commit for trial for forgery a person who had been accused under Section 290 of the Penal Code and discharged by the Magistrate, should specify the document which is considered to have been forged, and also the particular in regard to which it has been forged.

A Judge cannot commit for trial a person who had never been accused before, or against whom no formal charge was framed by, the Magistrate.

Mr. Sandel for the accused.

PHEAR, J.—It appears that in this case, Tarucknath Mookerjee was, in consequence of some knowledge or information obtained by the Magistrate, brought before the Magistrate under a warrant to answer a charge therein specified as

a charge made under Sec. 200 of the Indian Penal Code. After taking evidence, the Magistrate was of opinion that that charge was not made out, and that the evidence did not justify his framing any other charge against the accused. Accordingly he discharged him from custody.

The Judge, exercising the powers given to him by Sec. 296 of the new Criminal Procedure Code, has directed the Magistrate to commit Tarneknath Mookerjee for trial for forgery. I think that this order of the Judge is bad for two reasons.

In the first place, it is too vague and indefinite for the Magistrate to act upon. It should have specified the document which the Judge considered to have been forged; otherwise I do not understand how the Magistrate, who in this matter will have to act in a ministerial capacity only, can properly frame his commitment upon any specific charge at all; and I must further say that having regard to the evidence which was before the Magistrate, and which has come up to us on this occasion, I cannot perceive in what way any charge of forgery of a document can be made out at all.

And, secondly, I think the order is bad, because it directs that Tarneknath Mookerjee be committed for trial for having committed the offence of forgery, that being an offence of which he had not been in

any form accused before the Magistrate. The Section, or that portion of the Section (296) which is applicable to the present matter, runs thus:—"Provided that, in Session Cases, if a Court of Session or Magistrate of the district considers that a complaint has been improperly dismissed, or that an accused person has been improperly discharged, by a Subordinate Court, such Court or Magistrate may direct the accused person to be committed for trial." I read this to mean, may be committed for trial upon that matter of which he has been, in the opinion of the Judge, wrongfully discharged by the Magistrate; in other words, committed for trial for some offence with which he was substantially charged in the complaint, or which was specified in the warrant, or which was framed as a formal charge by the Magistrate at the preliminary hearing. Unless the powers of the Judge under this section to commit for trial be thus limited, it seems to me that a very strange result would follow, namely, that a man might be committed by the Judge for trial of an offence of which he had never been accused, or never even heard a word, as indeed would have happened here, until he was apprehended under the Judge's commitment. As the Criminal Procedure Code seems to have been carefully framed with a view to provide that no one shall be committed for trial without having previously had

a fair opportunity of meeting the charge upon which he is to be committed, I think this result I have mentioned can hardly have been contemplated by the Legislature; and I do not think the words when reasonably read with the context do give the Judge so extensive a power as that which is now sought for him.

For these two reasons I think the order of the Judge should be set aside.

CALCUTTA HIGH COURT.

The 30th April, 1873.

THE QUEEN, *vs.* KHERAJ MULLAH
AND ANOTHER.

Appeal from a Summary Trial—Insufficient Evidence.

On an appeal from a summary trial under Chap. XVIII. of Act X. of 1872, if the evidence which came before the Judge, whatever its shape, was not sufficient to reasonably satisfy him that the prisoners had been rightly convicted, he ought to have acquitted them.

PEAR, J.—It seems to us that the Judge treated the appeal before him more as if it were a special appeal than a regular appeal; and because he did not find sufficient on the record to convince him that the Magistrate was entirely wrong, he therefore affirmed his decision.

But the Judge was in the situation of an Appellate Court in which the matter came before him on regular appeal, and he ought to have judged as best he could from the materials put before him on the Magistrate's written judgment, whether or not, as a matter of fact, the

prisoners had committed the offence of which they had been convicted.

On reading the Sessions Judge's judgment, it seems pretty clear that he was unable even with the aid of the Magistrate's finding to form an independent judgment as to whether the prisoners had committed the offence or not. That being so, it was I think his duty to have acquitted them. If the evidence which came before him, whatever its shape, was not sufficient to reasonably satisfy him that the prisoners had been rightly convicted, he ought to have acquitted them.

* * * * *

Conviction quashed.

High Court's power to set aside the verdict of a Jury.—Act X. of 1872, Secs. 263, 271, 287, and 288.

On a trial by jury before a Sessions Judge, the jury returned a verdict of guilty. The Judge disagreed with the verdict, and submitted the case to the High Court. *Held* that the High Court has power to set aside the verdict of the jury, and to direct an acquittal.—*C. H. C.*, 29th and 30th April 1873. *Koonjo Lath*, XI., B. L. R., p. 14.

High Court's power to enhance punishment.—Act X. of 1872, Secs. 280 and 297.

JACKSON, J.—This Court is empowered, both as a Court of Appeal and also as a Court of Revision, to enquire into the sufficiency of sentences passed by the inferior Courts. One contingency in which that power may be exercised is when

Part III.—SHORT NOTES OF CIVIL RULINGS.

Inheritance of widowed Daughters.

MR. JUSTICE LOUIS S. JACKSON (Glover, J. concurring.)—As to the exclusion of Amrita (a widowed daughter) under the Hindoo Law, there seems to be no ground for that, because although a widow at the time of her father's death, still she could certainly, as the law now stands, remarry and have issue.—*24th February 1873. Sreemutty Bemola, II., L. O., p. 49.*

If a peon of one district directly serves summons on a defendant in another district, it is not such an irregularity as vitiates the whole proceedings and renders the decree and sale in execution thereof void—Act X. of 1859, Secs. 47, 56 and 58.—A sale cannot be invalidated because the decree in execution of which it was held was afterwards set aside.

THE CHIEF JUSTICE.—It seems to me there is no reason for holding that an irregularity of this kind by which the party is not injured vitiates the whole proceedings and renders the decree void and * * * that the sale should also be treated as void and as giving no title to the purchaser.

JACKSON, J.—I entirely concur in the view taken by the Chief Justice as to the meaning of the words in Sec. 56, Act X. of 1859, with reference to a summons being duly served according to the provisions of that Act. It seems to me that those words clearly refer to the mode in which a summons is to be served, and not

to the agency by which it is to be served.

As far as I am aware, all the decided cases in this Court take the clear position that * * * the sale, which has been held in execution of a decree either of the Civil or the Revenue Court, does not fall simply because the decree has been afterwards set aside.

MITTER, J.—I have further to remark that the objection as to the validity of the decree does not affect the sale to the purchaser, * * * and in that respect the case falls within the principle laid down in the case of *Jan Ali*, versus *Jan Ali Chowdry* (1, B. L. R., A. C. 56). In that case a suit for arrears of rent had been brought against the plaintiff, and an *ex parte* decree passed against him. While that decree was in force, the plaintiff's property was sold in execution, and purchased *bonâ fide* by one of the defendants. The decree was afterwards set aside on the application of the plaintiff under the provisions of Sec. 58, Act X. of 1859, upon the ground that he had been kept in ignorance of the proceedings instituted against him by the fraud of the principal defendant. But, notwithstanding the reversal of the decree the Court refused to interfere with the sale on the ground that, at the time when it was made, the decree was in full force.—*C. H. C., 3rd March 1873. A. B. Mackintosh, B. L. R., Vol. XI., p. 1.*

Weight to be attached to an unexecuted decree.

When a decree is tendered in evidence, if it be not followed up by evidence that it had been executed, or that the defendant against whom it was obtained had paid the money and satisfied the decree, it would be quite worthless.—*C. H. C., (Couch, C. J. and Glover, J.) The 24th April 1873, Bishen Prokash Singh, XX., W. R., p. 3.*

Sale in execution of a decree cannot be invalidated unless there be some fatal irregularity in the mode in which the decree is obtained or has been prosecuted.

PRIVY COUNCIL.—A sued, under Act X. of 1859, the widow of Z, as widow of Z and guardian of Z's son, for arrears of rent due by Z. He obtained a decree in 1862 against the widow as Z's representative, but it was declared that Z's son was not liable, on the ground that he had been adopted into another family; it having been alleged that Z's son was adopted by Z's brother's widow. A regular suit was brought by A, and a decree was made declaring that the adoption was invalid as made by Z's brother's widow without authority from her husband, and that Z having been the heir of Z's brother (according to Mithila law), Z's son was the heir to the whole property. Certain estates of Z were then, in 1867, put up for sale under Act XI. of 1859, in execution of A's decree for rent, and A became the purchaser. The certificate stated that the sale

was of the right and interest of the widow and contained a distinct reference to the decree obtained by A in the regular suit. B, the holder of a prior decree for rent against Z, having failed to obtain execution against the same property, then sued A and Z's son for a declaration that he was entitled to sell the property on the ground that it had come to Z's son as Z's heir, and that only the interest of the widow (who had no interest) had been purchased by A. Held by the Privy Council (reversing the decision of the Calcutta High Court) that A was entitled to the property; their Lordships being of opinion that there was no such irregularity in the proceedings before the Collector and the sale which took place, which would justify them in setting aside the sale; the whole proceedings, in their opinion, amounted to this,—that the estate of Z was sold in execution of a decree for his debt, and that the interest of his widow (the registered proprietor and ostensible owner of the estate), and also the interest of his son, if he had any interest, was bound by that decree. They were of opinion that unless there be some fatal irregularity in the mode in which the decree of A was obtained or drawn, or some fatal irregularity in the mode in which that decree has been prosecuted, the sale of the estates having been regularly held could not be set aside.—*The 21st March 1872, Court of Wards, X., B., L. R., p. 294.*

Execution of Decree—*Bond fides*—Limitation Act XIV. of 1859, Sec. 20 (Act IX. of 1871, Sch. 2, Cl. 167.)

PRIVY COUNCIL.—An execution-sale was stayed by consent for two months, and the execution-suit was struck off the file. During such period the execution-creditor applied to the Court to restore his execution-suit and to pay to him certain moneys in deposit in Court to the credit of the judgment-debtor in another suit, alleging that he (the execution-creditor) had attached them; but it turned out that he had attached them in another suit. *Held* by the Privy Council (reversing a judgment of the Calcutta High Court), "that these circumstances really affect only the *bond fides* of the proceeding. If their Lordships could infer from these facts that the petition was a colorable one, not really with a view to obtain the money, if they could come to that conclusion, in point of fact, the proceeding would not be one contemplated by the statute; but their Lordships cannot come to that conclusion. It appears that the decree-holder really desired to obtain execution of this money, and the fair inference is that he had mistaken the suit in which he could apply for execution, and having the attachment in another suit, he, by mistake, applied for execution in the present one, in which he had not obtained the previous attachment which is necessary to ground execution. Then,

assuming it to be a *bond fide* proceeding, which failed in consequence of that mistake, their Lordships think that the original petition was a proceeding to enforce the judgment, and to have execution of it. * * * Their Lordships do not consider that the fact that it was in the end abortive, takes from it the character of a proceeding to enforce the decree."—(Vide 5, B. L. R., 611).—*Appeal was allowed.*—*The 2nd May 1872, Ray Dhunput Singh Roy Bahadoor (Decree-holder, Appellant), XI, B. L. R., p. 23.*

Misdescription in the sale-certificate of the rights of a judgment-debtor—is not a ground for dismissing the suit of an auction-purchaser for possession.

The sale-certificate having declared the sale of the rights of a particular party in the land of which the identity is not in dispute, the mere circumstance of the right thus transferred is called by mistake by one name instead of by another, nearly importing the same thing does not constitute a difficulty in the way of giving the purchaser possession of the land specially where the land is further identified by the mention in the sale-certificate of the jumma at which the judgment-debtor's right whether talookee or otherwise is really held.—*C. H. C. (Jackson and Mitter, J. J.)—The 6th March 1873, Sheik Kulumooddeen Derogah, II, L. O., p. 119.*

18 *Short Notes* THE LEGAL COMPANION. *Civil Rulings.*

Act XXV. of 1861, Sec. 318.—Act XIV. of 1859, Sec. 15.

An award under Sec. 318 of the Criminal Procedure Code (Act XXV. of 1861) is no bar to a possessory action under Act XIV. of 1859, Sec. 15.—*C. H. C.*, (*Kemp and Glover, J. J.*) *The 3rd May 1873, XX.; W. R.*, p. 12.

Agreement to sell property not in possession but to be recovered by litigation.—Suit to enforce it.

PRIVY COUNCIL.—The facts of the case may be summed up as follows:—

An agreement was executed by A to B which contained “as I (A) have not the means to institute a suit at my own expense, I have determined to sell you a moiety or 8 annas share of the 12 annas 6 gundas 2 cowries 2 krants of the above jote-jumma, being the share left by my maternal grandmother, to which I am entitled; an 8 annas share of the talook aforesaid, and an 8 annas share of the mesne profits during the period of dispossession; and having fixed the consideration for the same at Rs. 3,000, and received the purchase-money in cash, I sell the same to you, and execute this deed of sale. The said amount is deposited with Dwarkanath Lahory, mooktear, the agent on your behalf, and all the expenses of the suit for dispossession and my lodging expenses shall be defrayed out of that sum. In the event of the suit being decided in my favour,

we shall each of us take the costs, mesne profits, jote-jumma, and the talook in the shares mentioned above. We will both of us institute the said suit in Court as plaintiffs, &c., &c.” Nothing having been done under the agreement, A came to an amicable settlement with the party against whom he intended to bring the suit referred to in the agreement; whereupon B brought the present suit claiming possession of half of the property under the deed executed by A, together with the mesne profits. The suit was dismissed both by the Zillah and the High Court. The Privy Council held that “their Lordships were of opinion that it did not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be recovered in a suit to be instituted to which both Joggesur (A) and the plaintiff were to be parties.

This construction of the deed disposes of the case; for even if the plaintiff be entitled to complain of breach of contract by Joggesur (A), she cannot recover under it possession of the property against Joggesur, *a fortiori* cannot she recover against Issur Chunder Dutt (the party whom A intended to sue), who was no party to the deed. It may be observed that, even if this were a suit for specific performance of the contract, or damages for the breach of it, it would have been necessary for the plaintiff to have

alleged either performance of her part of the contract, which was the payment of Rs. 3,000 to Dwarkanath Lahory, and such further sums as might have been necessary to the maintenance of the action, or at all events that she was ready and willing to perform this condition, but was prevented by the wrongful act of the defendant. There are no such allegations, and if there had been, it does not appear that they would have been sustained by evidence, for the case set up on the part of the plaintiff was not the performance of this condition, but something very different, namely, the payment to the defendant himself of this sum of money,—a statement which is disbelieved by the High Court, in which disbelief their Lordships concur.”—*The appeal was dismissed.*—*The 3rd May 1872, Ranee Bhobosoonduree Dussea, XI, B. L. R., p. 36.*

Onus of proof in a suit for rent by a shareholder lies on the plaintiff.

When a plaintiff sues for a certain share of the rent which is alleged to be due to him, and the defendant's objection is that the plaintiff's share is less than what is claimed, it lies on the plaintiff in such a suit in support of the allegations which he made relative to his cause of action to prove the extent of his share unless the defendant admits it to be that which the plaintiff alleges.—*C. H. C., (Phear, J.) The 24th March 1873. Sookram Misser, II, L. O., p. 120.*

No suit lies to set aside the order of the Magistrate under Sections 308, 310 and 311 of Act XXV. of 1861 (Section 521 of Act X. of 1872.)

A Magistrate issued an order under Section 308 of Act VIII. of 1869 calling upon A to remove his hut as being an obstruction to a public highway. A claimed a jury under Sec. 310, the majority of whom found that the Magistrate's order was reasonable and proper. A refused to obey the order, and his hut was removed under Sec. 311, A sued the Magistrate for possession of the land and for damages, *held* that such suit would not lie.—*C. H. C. (Couch C. J. and Kemp, J.)—The 18th April 1873, Mechoa Chunder Sircar, XI., B. L. R., p. 9.*

If a cause of action arise in the life-time of a person, no further time under Sec. 2 of Act XIV. of 1859 can be allowed to his representative by reason of his previous legal disability.

Plaintiff sued to recover certain moneys from defendant who had been appointed manager of property which plaintiff's uncle had conveyed to him by a will, and who had obtained a certificate under Act XL. of 1858. Among other things the suit related to a bond given by a person the amount whereof the defendant seems to have omitted to sue for and to realize. The suit was dismissed by the Lower Appellate Court on the ground that a suit might be brought by the plaintiff against the debtor himself as he can do it within three years of his attaining majority under Section 7,

Act XIV. of 1859. *Held*, that as the cause of action in respect to the bond had arisen in the lifetime of the testator, no further time would, under the proviso in Act XIV. of 1859, Section 2 be allowed to plaintiff by reason of his previous legal disability.—*C. H. C. (Jackson and Mitter.)—24th April 1873, Taruck Chunder Sen, XX., W. R., p. 2.*

Applications for execution may serve to keep a decree alive although they may have been rejected by the High Court on account of defects and informalities.

Although applications for execution of a decree might have been rejected on account of defects and informalities, if the applicants had acted in good faith and not merely with a view to save time, there seems to be no reason why they should not be allowed to rely upon those applications in answer to the plea of limitation raised against them by the judgment-debtors. That the decree-holders seriously intended to enforce the decree is fully borne out by their conduct. They caused notices to be served upon the judgment-debtors in the mode prescribed by law, and we further find that they persistently maintained their right to proceed with the execution until the final rejection of their applications by the High Court. In the absence of any evidence to the contrary, the only inference which can be reasonably drawn from these circumstances is, that the proceed-

ings in question were *bond fide*, and therefore sufficient to bar the operation of the law of limitation.

The learned Judge further says, that the present application also is defective in as much as it does not state specifically, the amount of costs and interest due under the decree. We do not think however that those defects are sufficient to warrant the final rejection of the application.—*C. H. C. (Mitter, J. and Jackson, J.). The 27th March 1873, Poorno Chunder Mookerjee, II., L. O., p. 123.*

Suit against Law-Agent—Meaning of the word "Contract" in Section 6, Act XI. of 1865—Sympathy of a Court.

CASE.—In a suit to recover the balance, unaccounted for, of plaintiff's money in the hands of defendant who had been employed as a law-agent on a salary to conduct and look after plaintiff's law suits, and to receive and disburse moneys connected with such law suits, it was *held* that the case might be brought under the terms "claim for money due under a contract" (Act XI. of 1865, Sec. 6) ; that the word "contract" is not restricted to express contracts, but refers also to implied contracts; and that therefore under Act XXIII. of 1861, Sec. 27, a special appeal would not lie. (*Jackson, J.*) Assuming the concessions made on both parties, it appears that the defendant was the servant of the plaintiff, and in consideration of the wages he received

he was bound to attend to his master's interests, and to disburse the moneys which he received from his master according to that master's direction, that is, it seems to us, to account for such moneys and to make good any balance that might remain in his hands. It is also possible to include this claim under the term "damage", because the plaintiff might claim the amount for which he brought this suit as damages by reason of the wrong done by the defendant in not acting fully up to his instructions. At any rate, the suit might be brought under the terms "claim for money due under a contract."

That being so, it seems that we have no power to entertain this appeal and disturb the judgment of the Lower Appellate Court, however erroneous or unreasonable it might appear. But we think it right to add one word as to the reasons for which we think the plaintiff in this case is not entitled to the sympathy of the Court. The defendant was employed as his law-agent. This implies the possession by defendant of certain qualifications, knowledge of law, habits of business and trustworthiness, and it appears that within the course of eighteen months money belonging to the plaintiff to the amount of Rs 2,500 passed through the hands of the defendant, and for this combined position of trust and competency, the defendant was supposed to be remunerated by the salary of

Rs 2. per mensem. If in this state of things the plaintiff with his eyes open voluntarily runs the risk of placing money in the hands of the defendant without taking security from him, or otherwise assuring himself of his honesty, he can hardly expect the Court to feel much for him when the defendant is found to betray his trust.—*C. H. C. (Jackson and Mitter, J. J.)—The 24th April 1873, Joogul Kishore Roy, XX., W. R., p. 4.*

Limitation with respect to decrees and orders affirmed by the Privy Council.

Where the Privy Council decree or order has not been barred by lapse of time, it was held that "the Privy Council order affirming the previous decrees must comprehend and embrace those decrees", as "it is somewhat incorrect to speak of executing those decrees as separate decrees, for they fall to be executed with the execution of the Privy Council order; in other words, the judgment-creditor is unquestionably entitled in executing the decree or order of the Privy Council to get the benefit of the decrees or orders which that Privy Council decretal order affirmed. It would be almost absurd if it were otherwise.

The proceedings which are had in the High Court for the purpose of getting the Privy Council order sent down to the Lower Court for execution must be taken as *bona fide* efforts to enforce and carry

into effect the Privy Council order. It is not necessary to enquire whether those proceedings were actually necessary or not.—*Calcutta High Court (Phear, J. and Ainslie, J.) 1st April 1873, Leithbridge, II., L. O., p. 124.*

A party made defendant in the course of a suit—Enhancement or Ejectionment.

A suit was brought against A to eject him from a land, on the allegation that he had been served with a notice of enhancement on the ground that he was holding that piece of land in excess of what he paid rent for; that he had agreed to pay such enhanced rent, but had not paid it. A in answer stated that not he but B was in occupation of the land, and he prayed that B might be made a defendant in the suit, which was done. Both the Lower Courts held B liable to ejectionment and to pay compensation. The High Court held, that under the circumstances of the case, at any rate the plaintiff might have known that B was in possession of the land, and yet he brings the suit on the deliberate statement that A was in possession of the land and had made default. How under these circumstances B could be affected by any notice on A to pay enhanced rent, or be made liable to be ejected, cannot be understood. He being the tenant on the land was entitled to the usual notice before he could be evicted or his rent enhanced by a decree of the Court,

but we do not see how in a suit against A in the midst of the agricultural Bengalee year he could be made liable to pay three times the rent he paid before or in default be ejected. *Held*, that the suit against B must fail, and considering the circumstances of the case from which one can hardly help thinking that the suit brought against A was fraudulently brought with knowledge that B was the tenant, the Court below should have dismissed the whole suit.—*C. H. C. (Jackson and Mitter, J. J.) 19th March 1873, Menazoodin Goleadar, XIX., W. R., p. 347.*

No separate suit lies for invalidating a sale held, during the minority of the plaintiff, in execution of a decree (against his father) barred by limitation.

In a suit for possession and declaration of title in respect of property claimed by plaintiff under a will from his father, which property had been sold in execution of a decree, plaintiff's ground of action was that execution had been fraudulently taken out, during his minority, of a decree barred by limitation. *Held* that the question ought to have been raised in the Court executing the decree, and not in a separate suit; the latter course being contrary to Act XXIII. of 1861, Sec. 11.—*C. H. C. (Jackson and Mitter, J. J.) The 24th April 1873, Najabut Ali Chowdry, XX., W. R., p. 5.*

It would not have been intended that the lessee while resisting lawful ejectment, should be allowed to create property upon the land for which his lessor would have to pay. This ground of appeal in my judgment fails, and I think that the appeal must be dismissed with costs.

PRIVY COUNCIL.

The 23rd January, 1873.

NAWAB SYUD ALLEE SHAH,

versus

MUSSAMMUT AMANEE BEGUM.

Appeal from the High Court,

N. W. P.

Admission of receipt of consideration-money before the Registering officer—Subsequent denial—Onus Probandi.

Where there is an admission of receipt of consideration-money made before the registering officer, and that admission is recorded under Act XX. of 1866, the presumption is in favor of the truth of such a public declaration, requiring cogent and convincing evidence to rebut it. Although such an admission is not conclusive, yet it ought to afford a strong presumption of truth and throw upon him who makes it, and afterwards comes to impeach such an acknowledgment, the burden of satisfying the Court, by strong and cogent evidence, that it was made under some circumstances of mistake or error.

Although the acknowledgment of receipt of consideration money in a deed of sale is written with the rest of the deed and obviously before payment is received, yet it may amount to an admission after the deed is handed over.

This was a suit brought by the

respondent Mussammut Amanee Begum, against the Nawab Syud Allee Shah, to recover a sum of Rs. 13,000 as the balance of the purchase-money which she alleges was due to her upon a sale made by her to the Nawab of a decree which she had obtained in the Courts in India. Her statement is that the price which was agreed to be paid by the Nawab for the decree was Rs. 14,000; that she received Rs. 1,000 only of that amount, and that the remainder was left in the hands of the Nawab. She not only denies the payment in fact, but she sets up an affirmative case. She says that a note under the seal of the Nawab was given to her for Rs. 13,000, which was to be paid off when the mutation of names took place. Therefore, her case is that the consideration-money was not paid, but a *rooqua* given for it, payable when the mutation of names took place. Now, although, in a general way, it may be said that the proof of the payment of the consideration lies upon the party who asserts the payment, their Lordships think that in this case the onus of proof was shifted and thrown upon the respondent in consequence of the acknowledgments she had made of the receipt of the whole purchase-money. Their Lordships think it is impossible to say that all those acknowledgments are merely formal; some of them seem to have been regular admissions made in a

formal way of the receipt of the money, and which were intended to be and were acted upon.

The deed of sale bears date on the 1st of February 1868. It contains the agreement to sell the half of the decree, that half being stated to be Rs. 16,956, and it contains an acknowledgment of the payment of the whole consideration. Now it is to be observed that this acknowledgment may, after the deed has been delivered over or registered, amount to an admission of the payment; although at the time when it was written, payment obviously was not made, for it is written in with the rest of the deed, and the deed was clearly written and executed by the respondent before the money was paid. However, that is perfectly consistent with its afterwards becoming an acknowledgment of the payment of the money, because, although the money was not paid at the time the deed was written, and whilst the deed remained in the hands of the respondent or of her agent, it was of course inoperative for any purpose, it may be inferred that the deed would not have been handed over until the money was paid; but undoubtedly it would seem from the observations of the Subordinate Judge and the Judges of the High Court that it is not unusual that such deeds should be handed over, although the consideration-money be not paid.

But the acknowledgment of the

payment of the whole purchase money does not rest upon the deed of sale; on the contrary, there are two subsequent acknowledgments which appear to their Lordships to be entitled to greater consideration and weight. The deed was registered on the 17th February, a fortnight after its date, and at the time of the registration, Abdool Humeed, who was the agent of the respondent, and her son-in-law, made an admission, which is recorded, that the whole consideration-money was received "in cash, in a lump." It appears that that admission is one which, if made, the Indian Registration Act of 1866 requires the Registrar to record. The 65th section of that Act, which relates to the procedure on admitting the registration, enacts that "on every document admitted to registration there should be endorsed from time to time the following particulars:" and amongst the particulars is this: "Any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration made in his presence in reference to such execution." Thus the Legislature has thought it desirable that the public register should contain a record of any payment that takes place in the presence of the registering officer, and of any admission of payment made in his presence in reference to such execution, and

requires him to record it. The acknowledgment was made and recorded in pursuance of this Act, and the presumption ought to be in favor of the truth of such a public declaration, requiring cogent and convincing evidence to rebut it.

Their Lordships do not say that an admission so made is conclusive, but still it ought to afford a strong presumption of truth, and throw upon him who makes it, when he comes to impeach such an acknowledgment, the burden of satisfying the Court, by strong and cogent evidence, that it was made under some circumstances of mistake or error. Nothing of the kind appears here, and one does not see why the admission should have been made in this case unless it were true, because it was not necessary for the purpose of the registration, the Act only requiring that, if the admission be made, it shall be recorded.

But the evidence of acknowledgment does not stop there. A further act was necessary to perfect the title of the appellant, namely, the mutation of names in the Court which had given the decree, and accordingly, on the 3rd of March, a petition was presented to that Court by Abdool Humeed, which again contains an acknowledgment of the payment. That petition states the sale of the decree, and contains an allegation that the Mussammut had received the consideration-money from the pur-

chaser, who had become the proprietor of her half share, and upon that petition her name was expunged and that of the purchaser of the decree recorded in her place. There seemed to be again no necessity for making this acknowledgment, for the name might have been changed, for anything which appears, without such a statement, but it is made, and that so late as the 3rd of March, more than two months after the transaction.

It seems, therefore, to their Lordships that the onus was thrown upon the respondent to prove that the money was not paid. She sets up that this *rooqua* was given, and that the money was to be paid when the mutation of names took place, and was not paid. Then her case is that in the following October the Nawab came to her Moulvie and asked him for the note, as if he was going to pay it off, and having obtained possession of it, said "I cannot pay it until you come to Meerut." and when the Moulvie went to Meerut he refused to pay at all. That, no doubt, would be a gross fraud on the part of the Nawab, but fraud is not to be presumed, and must be proved by satisfactory evidence. The evidence is of the most meagre description. The witnesses who speak to the Nawab having thus obtained possession of the note do not say that any remonstrance or any objection was made at the time. They simply say that he so

obtained the note, and then said, "come to Meerut, and it shall be paid."

The Nawab, who was examined as a witness, was asked no questions upon the subject in cross-examination. It seems to their Lordships that the Judge of first instance came to the right conclusion in finding that he could not give credit to the story of the note. Then, if credit cannot be given to that transaction, it seems to their Lordships that none can be given to the rest of the case of the respondent. She has set up an affirmative case which is entirely untrue; and when that has been done, there is the strongest inference that the fact of payment which that affirmative case was intended to refute is a fact which, but for the attempted refutation, she knew would be established against her by the evidence upon the other side. When we come to the evidence of the fact of payment, witnesses are called on both sides, and observations may be made on all of them. They were connected with the parties on the one side or on the other, and if the case rested on their testimony, it would be very difficult to say which set of witnesses should be credited; but after the admissions which have been made, supposing their Lordships were left in doubt upon that evidence, they could not find for the respondent.

It is not unimportant to observe that the Nawab, who is a gentle-

man of rank, went into the witness box on this occasion, and gave his testimony, and of course offered himself for cross-examination. Their Lordships have often said that it would be very desirable if native gentlemen would do that more frequently, because presumptions are necessarily made against them, if when parties in a Court of Justice, and facts are in dispute the knowledge of which must rest with them, they will not present themselves to the Court to state their own evidence and knowledge of those facts. Presumptions are necessarily made against persons who will not subject themselves to examination when a *prima facie* case is made against them, and when by their own evidence they might have answered it. However, in this case, the Nawab certainly did present himself as a witness, and he has stated in the most distinct manner that the money was paid.

Upon the evidence, therefore, as it stands at present, their Lordships think that the respondent has entirely failed to show that the acknowledgments of her agents are untrue, and that the money was left unpaid. The Subordinate Judge seemed to have felt some doubt as to his having got at the truth of the transaction. He doubted whether it was a real transaction such as the documents represent, but if it were not, still the respondent would not be entitled to recover

the Rs. 13,000. If the transaction was not a real one, then of course, it never could have been intended that the Rs. 13,000 should be paid, but after all that is a mere suspicion; both parties were content to treat the transaction as a real one, and Courts of Justice cannot act upon suspicion when both parties come before them so treating it. They must then regard the evidence which is brought forward on either side according to the rules which usually guide the Courts in the consideration of issues and the evidence brought to support them.

The Judges of the High Court have scarcely gone at all into the consideration of the evidence, but, treating the evidence on both sides as doubtful, they have drawn an inference from an agreement that was subsequently made between the parties,—an inference so strongly in favor of the respondent that they think they can rest their judgment upon it, and reverse that of the Subordinate Judge. Their Lordships, upon looking at that document, cannot say that in one aspect such an inference may not be made; but on the other hand, inferences may be made from it which support the case of the appellant. No doubt it is a document which cannot altogether be accounted for. It seems that in the original deed of sale there had been a clause to the effect that if the decretal money was not realized, the property of the respondent should be liable to

make good the consideration for the sale to the Nawab. It is stated that that clause was struck out at the execution of the deed by the Moulvies of the parties from some misunderstanding, or from the fact of one having over-reached the other; but undoubtedly it appears to have been struck out by consent, for both Moulvies signed the memorandum in the margin that that was so. After the registration and the mutation of names had taken place, a fresh agreement was signed by the respondent on the 1st of April, the object of which is said to have been to restore the clause which had been so struck out. Apparently in words the clause goes further, for it seems to make her property liable, not merely for the consideration-money, but for whole amount of the decree. However, in a subsequent proceeding, both parties appear to have treated this agreement as only restoring the original clause and making her property liable for the consideration-money. The High Court dwelt a good deal upon the agreement as a new and increased liability that she took upon herself, and as there was no consideration for her incurring it, their inference is that she did it in order to obtain payment of this money. If the clause is literally taken, it would be no doubt a very unwise agreement, because she was undertaking a much larger liability; and Rs. 13,000 was an inadequate consideration for what she

was doing. But if it really was her intention in signing it to get the Rs. 13,000, the question immediately occurs why did not she obtain it? She had this document in her own hands, and if the Nawab was reluctant to pay this money, she might have said "Well, I will give you this agreement. I want the Rs. 13,000. I will give you this agreement if you will pay me." But this was not done. Therefore, it seems that no strong inference can arise in her favor from the circumstance of her having made it; and, on the other side, the appellant says:—"If the money had been unpaid, why was not some reference made in this agreement to the fact that it was unpaid?" From the omission to do so it is inferred on his part that the money was not really due at that time, otherwise some mention of it would have been made in this fresh document drawn up long after the time when, according to the statement of the respondent, the money ought to have been paid.

It is also not unworthy of observation that from the time when it is said this money ought, according to the respondent's own case, to have been paid, namely in March, it is not pretended that any demand was made for it until October, although we must assume that the respondent was a needy woman.

Upon the whole, therefore, their Lordships think there was not sufficient ground for disturbing the

first judgment of the Subordinate Judge, and they will humbly advise Her Majesty to allow this appeal, to reverse the decision of the High Court, and, in lieu thereof, to order that the appeal to the High Court be dismissed and the judgment of the Subordinate Judge be affirmed, and that the costs, if any, paid by the appellant to the respondent in the Court below should be repaid. Their Lordships in this case say nothing about the costs of this appeal, as they understood that the suit was prosecuted below as a pauper suit.

PRIVY COUNCIL.

The 22nd May, 1873.

RANEE SHORNOMOYEE,

versus

WATSON AND CO.

Appeal from the Calcutta High Court.

Suit for possession—if plaintiff cannot prove his title, defendant's title need not be seen.

In a suit for ejectment, the plaintiff must recover upon the strength of his own title and not upon the weakness of that of his adversary. It is immaterial in such a case to consider whether the land is the property of the defendants or not, because unless it is proved to be the property of the plaintiff, he is not entitled to turn them out.

If ever there was a clear case, this is one which falls within that description. The suit is brought to recover 15,000 beegahs of chur land to the east of Chilmaree Dara.

It is claimed* by the plaintiff as part of a khas mehal purchased by her from the Government of Bengal on the 15th January 1864.

The defendants are in possession of the land, and were found by the Magistrate in a proceeding under the Code of Criminal Procedure to be in possession. The plaintiff seeks to turn them out. The suit is in the nature of an ejectment suit, and the plaintiff must recover upon the strength of her own title, and not upon the weakness of that of her adversary. It is immaterial, therefore, in this case to consider whether the land is the property of the defendants or not, because whether it is their property or not, unless it is proved to be the property of the plaintiff, she is not entitled to turn them out; nor is it necessary to consider whether it ever was the property of Government or not, because unless the plaintiff can make out that, being the property of the Government, the Government conveyed it to her, she is not entitled to recover. The question depends upon what was sold by Government, and what was bought by the plaintiff * * * * * The plaintiff has made out no title to the land which she has claimed.

Appeal disallowed.

PRIVY COUNCIL.

The 28th March, 1873.

RAJAH PIRTHEE SINGH,
versus

RANEE RAJ KOWER.

*Appeal from the High Court,
N. W. P.*

*Hindoo Widow not residing in her
husband's house—Maintenance.*

A Hindoo widow does not forfeit her right to property or maintenance by reason of her leaving her husband's house unless she leaves for the purpose of unchastity, or for any other improper purpose.

In this case their Lordships are of opinion that there was no direction by the husband's will which rendered it necessary for the widow to reside in her husband's house. The case of a widow is very different from the case of a wife. A wife of course cannot leave her husband's house when she chooses, and require him to provide maintenance for her elsewhere; but the case of a widow is different. All that is required of her is that she is not to leave her husband's house for improper or unchaste purposes, and she is entitled to retain her maintenance unless she is guilty of unchastity or other disreputable practices after she leaves that residence.

The case was tried by a Subordinate Judge, in this instance, who was a Hindoo, and therefore must be acquainted with the habits, usages, and religion of Hindoos; and he thought that the widow hav-

ing left the husband's house, was still entitled to her maintenance, and he awarded her the sum of 150 rupees a month with a sum of money calculated at that rate for the years during which she had not been allowed maintenance. The case was appealed to the High Court, and that Court thought that, having regard to the amount of the husband's property, the widow was entitled to a larger sum and they awarded her maintenance at the rate of 200 rupees a month. Their Lordships do not think it necessary to disturb that decision. The amount of maintenance, it is stated in the Vyavastha 197 in Shama Churn's book, should be fixed with reference to the proprietor's estate. Now in this case the deceased husband left property to the extent of two lakhs, or 20,000*l.* a year. It does not appear to their Lordships to be excessive even though he left four widows, that each of those widows should have at the rate of 200 rupees a month, equal to 210*l.* a year. Looking to the state in which a widow is bound to live and the religious duties which she is called upon to perform, it does not appear to their Lordships, having reference to the property of the deceased husband, that this widow ought to receive a less sum than that which has been awarded to her by the High Court, namely, Rs. 200 a month.

Some question was made as to

the right of the widow to recover past arrears. A case was cited from the Madras High Court, in which arrears were awarded. In the case also in which Sir Lawrence Peel gave that elaborate judgment * * * * * arrears of maintenance were awarded to the widow as well as a decree in her favor with regard to future payments.

Under these circumstances their Lordships are of opinion that the decision of the High Court is correct, and they will therefore, humbly recommend Her Majesty that that decree be affirmed with the costs of this appeal.

PRIVY COUNCIL.

The 29th May, 1873.

KHAJAH GOUHUR ALI KHAN, *rs.*

KHAJAH AHMED KHAN.

Appeal from the late Sudder Dewanry Adawlut of Calcutta.

Mahomedan Law—Evidence of Divorce—The Judge who hears the witnesses is the best person to judge of the credit to be given to them.

Although writing is not necessary to the legal validity of a divorce under Mahomedan law, yet where a divorce takes place between persons of rank and property, and where valuable rights depend upon the marriage and are affected by the divorce, the parties for their own security would be expected to have some document which should afford satisfactory evidence of what they had done.

The Judge who hears the witnesses is really the best person, and very often the only person, who can judge of the credit to be given to them, because he not only hears

what they have to say but he observes the manner in which they say it. He is also much more conversant with the general position of the persons who come before him than any Court of Appeal can be.

This is an appeal in a suit originally brought in the Civil Court of the City of Patna by the present appellant, Khajah Gouhur Ali Khan, who was the nephew and one of the heirs of Mahomed Ibrahim Khan.

The suit was brought by him as one of the heirs, together with a lady Fatimatoonissa, who was the mother of Mahomed Ibrahim Khan, against Khudijah Begum, who claimed to be the widow of the deceased Mahomed Ibrahim Khan. After his death she, claiming as his widow, obtained, in a summary suit brought in the Civil Court at Patna, possession of one-fourth of his property, under the provisions of Regulation XIX. of 1841. It appears that there was an appeal in that summary suit to the Sudder Court, which affirmed the order.

The present suit was brought in regular form to set aside those summary orders and to obtain possession of the one-fourth of the property which Khudijah Begum had retained under them, upon the allegation that she had been divorced by Ibrahim Khan; and the only question raised which it is now necessary for their Lordships to consider is whether Khudijah Begum was divorced or not. It was alleged by the mother and the

nephew that a divorce had taken place in the year 1815. The Judge of the Civil Court of Patna decided in favor of the claim of the widow. There was an appeal to the Sudder Dewanny Adawlut, but no decision was given by that Court upon the present issue. It appears that in a former suit, where the legitimacy of Khajah Gouhur Ali Khan, as the nephew of Mahomed Ibrahim Khan, was in issue, a decision had been given against his being the legitimate nephew; and the Sudder Dewanny Adawlut, on the appeal to them in this suit, affirmed the decision of the Judge of the Civil Court of Patna, not upon the ground upon which he had decided but on the ground that the appellant had not proved himself to be the legitimate nephew.

The case, therefore, comes before their Lordships substantially on appeal from the decision of the Civil Court Judge. The question is entirely one of fact, and their Lordships are unable to come to the conclusion that the Judge of the Civil Court of Patna was wrong in holding that the divorce was not proved. The claimant was the wife of Mahomed Ibrahim Khan. She had been married a considerable number of years to him, but undoubtedly there had been a separation as early as the year 1827, and in that year suits had been brought both by the husband and the wife. The husband brought a suit in the nature of a

suit for restoration of marital rights against the wife; and she brought a suit against him to recover her dower, or so much of her dower as was prompt; and in both these suits, which were continued about five years in the Courts, decrees were given for the plaintiffs; one in the year 1831, and the other in the following year, 1832; that is, the husband obtained a decree for the restitution of conjugal rights, and the wife obtained a decree for the share of her dower which was prompt. It seems that from 1832 down to 1845, no steps were taken to enforce the decrees on either side. There is no evidence as to the terms upon which the husband and wife were living in that interval of time, but it would seem that they were living apart.

In July 1855 both parties presented petitions in their respective suits, praying that satisfaction might be entered upon the decrees. The petitions alleged that they had compromised the suits, and desired to abandon any rights that they might respectively have under their decrees. Those petitions clearly indicate that, up to that time, no divorce had taken place. Although there had been a separation, although these decrees had been obtained and the parties had lived separately, yet no dissolution of the marriage by divorce had at that time taken place. Indeed, it is not contended on the part of the appellant that a divorce had then

been effected, but it is said that a short time afterwards Mahomed Ibrahim Khan went to the house of his wife, and that there was a formal divorce or the commencement of a formal divorce; that words of divorce were there spoken by him and assented to by her, and that this formal divorce was repeated on two other occasions, at intervals of a month between such formal act.

The question is, whether their Lordships can rely upon the evidence of the witnesses who say that such a transaction took place. The same witnesses who were called to prove the divorce assert that, shortly after this alleged divorce, Khudijah Begum married a Mahomedan of wealth and rank of the name of Mahomed Hossein, and lived with him openly in the city of Patna. The plaintiff asserts not only the divorce, but the second marriage,—that the second marriage took place in the life-time of Mahomed Ibrahim Khan, and shortly after the divorce.

Now, it is to be observed in the first place, that there is no writing whatever produced to prove that the divorce took place, or to corroborate the statement of the witnesses. It is quite true that writing is not necessary to the legal validity of a divorce under Mahomedan law, but where a divorce takes place, as in this case, between persons of rank and property, and where valuable rights depend upon

the marriage and are affected by the divorce, one would certainly expect that the parties, for their own security, would have had some document which should afford satisfactory evidence of what they had done. In the suit for restitution of conjugal rights, Mahomed Ibrahim Khan himself spoke of the necessity of such a document when the wife alleged that he had before that suit divorced her, which shows that in his contemplation (although he was wrong in supposing that it was necessary) it might be expected that amongst persons in his position such a document would have been executed, however, there is no such document; there is no writing whatever referring to the divorce, and therefore the case depends entirely upon the credit to be given to the witnesses who say that they were present during the transaction, and who also say that they were present at the second marriage. Of course, if the second marriage during the life-time of Mahomed Ibrahim Khan had been satisfactorily proved, it would of itself have been cogent evidence of the fact of the divorce, but that marriage is even less satisfactorily proved than the divorce itself. The witnesses who deposed to both transactions being the same, the divorce derives no substantial confirmation from the evidence which has been given of the subsequent marriage.

The Judge of the Civil Court of

Patna heard these witnesses. They were all examined in his presence, and it is impossible not to consider that the Judge who hears the witnesses is really the best person, and very often the only person, who can judge of the credit to be given to them, because he not only hears what they have to say, but he observes the manner in which they say it. He is also much more conversant with the general position of the persons who come before him than any Court of Appeal can be. What says of the witnesses is that their depositions are unworthy of any credit. He further says that, with the exception of one or two, the whole were illiterate and low people, and they certainly seem to be so.

Then, on which side is the balance of probabilities? The case on the part of the appellant is that this lady, in the life-time of her first husband, married and lived with Mahomed Hossein in the city of Patna, and one or two of the witnesses, when asked how they knew it, say that it was impossible for a man of the rank and wealth of Mahomed Hossein to be married without the people in the city of Patna knowing it. If this be so, it certainly seems a most improbable circumstance that Mahomed Hossein, a gentleman of position in Patna, should have allowed his wife to come forward in the Court of Patna and claim a share of the estate of Mahomed Ibrahim.

Khan, upon the assumption that she was the lawful wife down to the time of his death. That is, in their Lordships' view, a very strong improbability.

Then, with regard to dower; if she had been divorced she would have been entitled to her dower, not only to the prompt dower but to the whole of it; but she neither sued for her dower, nor is there any arrangement satisfactorily proved with regard to her remission of it.

One or two witnesses say that she did, behind the curtain, use the words that she had remitted the dower, but only one or two of the witnesses venture to say that, and it does seem incredible that, if she was entitled to a large dower, she should have given it up without the husband obtaining from her some writing or other authentic evidence of her having so released it, particularly as she had once before sued for the prompt dower and had obtained a decree and that suit was very formally compromised by the petition to which reference has already been made.

There is an improbability referred to by the Judge of the Civil Court with regard to the ceremony alleged to have taken place on the second marriage. It appears that the lady was of the Soonee school, and Mahomed Hossein of the Sheeah, and the Judge says what appears to be well founded, viz., that the ceremony would

usually be according to the school to which the husband belonged. In this case it was the other way. That is an improbability, and it may be that these witnesses, who, many of them, were ignorant persons, were not aware, when they gave their evidence, that it would be open to the observation that it was an improbable story they told.

It is to be observed that, according to some witnesses, the Cazeer was present at the second marriage. If this be true, the Cazeer should have been called as a witness; but he was not examined, nor his absence accounted for.

Their Lordships think it unnecessary to go at any detail into the evidence. They see no reason for coming to a different conclusion from that at which the Judge of the Civil Court at Patna has arrived, and they do not feel justified in saying that he is wrong when he has recorded that the witnesses who came before him were, in his opinion, unworthy of credit. If they are unworthy of credit, as the whole case depends upon their testimony, and the onus is upon the plaintiff to prove the divorce which he alleges, the case necessarily fails.

Although, in their Lordships' view, the decree of the Sudder Court ought to be affirmed, their opinion proceeds upon the ground on which the Civil Judge of Patna dismissed the suit, and not upon that on which the Sudder Court

affirmed his decision. The affirmance of the decree will not, therefore, prejudice the status of the appellant as the nephew of Mahomed Ibrahim Khan.

Their Lordships will humbly advise Her Majesty to affirm the judgment of the Sudder Dewanny Adawlut, which is the judgment appealed from, and to dismiss this appeal with costs.

PRIVY COUNCIL.

The 12th December, 1872.

BETTS AND OTHERS,
versus

ARBUTHNOT AND CO.

Appeal from the Calcutta High Court.

Repudiating the conduct of Agents.

Agents are only bound to act to the best of their judgment and to use proper care and skill in executing what they are ordered to do; and their action cannot be repudiated unless they are shown to have been guilty of

This is a suit brought by Messrs. Arbuthnot and Company, who are merchants and agents at Madras, against Mr. Betts and his partners, who are indigo planters in Bengal. The suit is brought to recover the price of certain indigo seed which Messrs. Arbuthnot and Company purchased as agents for Mr. Betts and his partners, under instructions received from them. In one of the earliest letters from Messrs. Arbuthnot and Company, they say:—
“At the request of Mr. Herklots,

of Coonoor” (Mr. Herklots was a friend of Mr. Betts): “we write to inform you that indigo seed of this year’s growth is now available here, and that supplies will continue to come in for the next two or three months. The present price is Rs. 6-4 to 6-8 per maund, but the demand is so great that we expect to see shortly a considerable rise. If you send us an order, we will endeavour to execute it to the best of your interests.” It appears that, at first, Mr. Herklots inquired of Messrs. Arbuthnot and Company whether they could buy 2,000 maunds, which was a much larger quantity than the defendants wanted to sow in the following October. The probability is that when Mr. Betts instructed Messrs. Arbuthnot and Company to purchase, they were purchasing upon speculation, intending to pay the price of the seed out of the money to be obtained by re-selling it. There is no doubt that the defendants were not prepared to pay for the seed, and it was unlikely that they would be buying seed in February to sow in October, when they had not the means to pay for it. Mr. Betts, by a letter of the 13th February, instructed Messrs. Arbuthnot and Company to purchase for him 1,000 maunds upon the most favorable terms. He says, “best fresh indigo seed;” but he sent them a telegram afterwards, instructing them to buy, not the “best,” as requested in the letter, but “fresh, good.”

According to the evidence of Mr Betts himself, what he instructed Messrs. Arbuthnot and Company to purchase was, "one thousand maunds indigo seed, fresh, good, on most favorable terms." Having received a letter of the 25th February, informing him that Messrs. Arbuthnot and Company had purchased at the rate of 10 rupees per maund, Mr. Betts writes on the 6th March, the following letter:—"Yesterday I despatched a telegram to you to the effect that the seed I ordered must be fresh and good." That "yesterday" was the 5th of March. He had received Messrs. Arbuthnot and Company's letter on the 2nd, stating that they had actually purchased. Then why should he immediately send off a telegram to say that he hoped the seed would be fresh and good? He had instructed Messrs. Arbuthnot and Company to buy fresh and good; why should he suppose that they had not bought fresh and good? And yet he thinks it necessary, on the 5th of March, to send a telegram to them to say that the seed which he ordered must be fresh and good, as he needs it for his October sowings. "And I now beg to advise you that if the seed is not of this description,"—"Why should he suppose that it was not of that description?—"that is, *fresh*, and such as I sent you an order for, you must be aware that it would be ruinous to sow it. Pray, therefore, kindly

exercise your judgment in this matter." How were they to exercise their judgment? They were instructed to purchase, and they had purchased. Mr. Betts must have supposed that they had purchased according to their instructions, and he must have known that if they had not purchased according to their instructions or used due diligence in carrying out his order, he was not bound to take it. There was, therefore, no necessity to write that letter if the transaction really was such as Mr. Betts would have it supposed. It appears that when Mr. Betts found that the price had risen from Rs. 6-4 to 10 he was anxious to get out of his contract. It is clear that he was not able to pay. He afterwards asks Messrs. Schoene and Company whether they can sell the indigo for him, and when they tell him that Madras indigo is not saleable in Bengal, then, for the second time, he asks for a sample. He had originally asked for a sample; but Messrs. Arbuthnot and Company had informed him that the indigo had been sent to Messrs. Thomas and Company as his agents, and that they would give him a sample. He was satisfied with that answer, and did not ask again for a sample until he was informed by Messrs. Schoene and Company that they could not sell the indigo for him to advantage; then he asks for a sample, and a sample is given to him, and then

he commences his experiments to see if the seed will germinate.

Three of the Judges of the High Court have found that Messrs. Arbuthnot and Company properly discharged their duty as agents. Messrs. Arbuthnot and Company, although they did state in their plaint that they were acting as sellers, were really only agents for Mr. Betts. Having purchased in Madras they had paid or would have to pay the person from whom they purchased; they were, therefore, in the nature of sellers, although they were really only *del credere* agents. It was necessary for Mr. Betts, before he could repudiate what his agents had done for him and refuse to take the indigo and to pay for it, to show affirmatively that Messrs. Arbuthnot and Company had been guilty of negligence in executing the order which he had given them. He deals with the sample when he gets it by sowing it and testing it. Whether that test was or was not a good one it is not necessary to inquire, for Messrs. Arbuthnot and Company, when they were buying indigo seed at Madras in a rising market, under an order to purchase on the most favorable terms, could not have experimented by sowing a sample of the seed and waiting eight or ten days before they purchased to see whether it would germinate. They were only bound to act to the best of their judgment and to use proper care and skill as

agents in purchasing what they were ordered to purchase, *viz.* good, fresh indigo seed.

Now, did Mr. Betts prove that Messrs. Arbuthnot and Company had not fairly and properly executed his order? It appears to their Lordships that there is no evidence to that effect, and they agree with the views which the learned Judges of the Court below have taken that Messrs. Arbuthnot and Company did fairly and properly execute the order. The Chief Justice says—"Looking at the evidence, I can see no reason for distrusting the plaintiffs' case, and thinking that they did not perform that which they undertook to do for the defendants, namely, to purchase good, fresh seed." Mr. Justice Louis S. Jackson says—"I have no doubt that Messrs. Arbuthnot and Company, as agents of the defendant, honestly fulfilled the commission intrusted to them, and that the plaintiffs are entitled to recover the whole of the amount they claim in this suit," with the exception of a small amount for excess. The learned Judge of the first Court did not try the case upon the evidence. He decided against the plaintiff on the ground of variance. That ground has, very properly, been given up to-day, and has been admitted that the Judge ought not to have dismissed the plaintiffs' claim upon the ground of the variance. There were three Judges of the High Court, and

they were unanimous in coming to the conclusion that Messrs. Arbuthnot and Company did properly and honestly fulfil the commission which had been intrusted to them.

Their Lordships, therefore, see no reason for interfering with the judgment of the Court below, and they therefore will humbly advise Her Majesty that the decision of the High Court be affirmed with costs.

PRIVY COUNCIL.

The 21st January, 1873.

MAHARAJAH JUGGERNATH SAHEE,
AND ANOTHER,

versus

MUSSUMMAT AHLAD KOWAR AND
OTHERS.

*Appeal from the Calcutta High
Court.*

*Burden of proof in a suit for re-
sumption of possession.*

In a suit to resume possession of land, the plaintiff alleged that the same was granted as a jageer tenure to a certain ryot and his lineal descendants, and that the ryot's descendant had failed. *Held*, that it was necessary for the plaintiff to prove the grant which he alleged in his plaint; that then the onus of proof might have been shifted upon the defendants; and that as the plaintiff failed to prove the very foundation of his case, it was unnecessary to determine whether or not the grantee's descendants failed, or on whom the burden of proof lay with respect to that issue or to determine the truth or falsehood of the defendant's plea.

This was a suit brought by the plaintiff to recover possession of certain lands upon the ground that

those lands were granted by an ancestor of his to one Pryag Roy to be held in jageer tenure, that is, to Pryag Roy and his lineal descendants, that Pryag Roy's lineal descendant had failed, and therefore the plaintiff was entitled to resume possession.

A good deal has been said on the subject of the burden of proof in this case. It is manifest that the plaintiff could not, by merely alleging that a grant had been made and that that grant had failed, entitle himself to a decree: some burden of proof must rest upon him: and the only real question is, what amount of proof could be reasonably expected from him, so as to shift the burden of proof upon the defendants. Their Lordships are clearly of opinion that it was necessary for him to prove the grant which he alleged in his plaint, without which the plaint would have shown no cause of action, namely, a grant to Pryag Roy; for on whomsoever the burden of proof may lie with respect to the subsequent part of the case, whether it lies on the plaintiff to prove that the descendants of Pryag Roy had failed, or upon the defendant to prove that they still lived, it is necessary to ascertain to whom the grant was made, in order to determine the subsequent question to be tried, namely, whose descendants have or have not failed.

It appears by the plaintiff's own showing that this tenure was creat-

ed in the proper and usual manner, namely, by a pottah and kubooleut, the pottah being the grant itself, which would be presumed to be in the possession of the defendants,—the kubooleut being also an original document, whereby the grantee acknowledges the grant, and that he holds upon the terms of the grant; this would be in the possession of the ancestors of the plaintiff, and would be expected to be found among his muniments of title. The plaintiff alleges that such a kubooleut did exist, but he has failed to give any proof of it whatever. He has not produced the kubooleut; he has not given secondary evidence of it; he has not even laid the foundation for giving secondary evidence, if he had secondary evidence of it in his possession. He does not call any body who has the custody of his muniments of title, or who is acquainted with them or with their place of custody, for the purpose of showing that search has been made, and that no such kubooleut has been found. Indeed, it is not inconsistent with the plaintiff's case that such a kubooleut or some kubooleut under which this property was granted may at this moment be in his possession. He has contented himself with putting in certain criminal proceedings instituted by him in 1842 against his then Canoongoe, wherein he complained that the Canoongoe had abstracted his records. It appears by those

proceedings that the Canoongoe was convicted and sentenced to imprisonment until he should deliver them up, but it is not shown that that sentence was ever executed, or if executed to any extent whether it had or had not the effect of inducing the Canoongoe to give up all or any of the records. But it would appear from this proceeding, that, at all events, according to the plaintiff's showing, the kubooleut was in existence at no very distant time, namely, in the year 1842; and it appears to their Lordships that there would be, or ought to be, no very great difficulty in proving that such a kubooleut did then exist, and that it was one of the documents which were abstracted by the Canoongoe (if, indeed, it were so abstracted); because in these criminal proceedings no less than three witnesses were called, who gave a general description of the documents said to be abstracted, though they do not, indeed, specify this. None of these witnesses are now called, nor is any explanation given of their not being called. It is not shown whether they are dead or absent, or whether it is impossible to call them; and the plaintiff himself, who instituted these very proceedings, and who may be supposed to be cognizant of a document of such importance, if it existed among his records, does not think fit himself to give evidence.

Under these circumstances there is an entire failure of proof of the

kuboolent. No evidence either primary or secondary is given of it, nor indeed, as before observed, has even the foundation been laid for giving secondary evidence.

But it has been contended on the part of the plaintiff that the absence of this proof may be supplied by other evidence in the case. It is said that the nature of the tenure is proved by the admissions of the defendants, and so far their Lordships are disposed to agree with the Counsel for the plaintiff. But then it is further alleged that it has been shown that Pryag Roy was the first person in possession of this property under the grant. And if it had appeared that Pryag Roy was in fact the first jageer in possession of this property, and that it had descended from Pryag Roy through father and son to the last owner, Deo Persaud, then it might have been that some evidence was given of the nature of the tenure and of the person to whom it was granted, independently of the kuboolent, so as to shift the proof upon the defendants; but their Lordships are of opinion that it is not proved that Pryag Roy was the person originally in possession, and that, therefore, the absence of the kuboolent is not supplied by evidence of the description referred to.

That being so, in their Lordships' opinion; the plaintiff has altogether failed to prove the very foundation of his case, namely, the

grant to Pryag Roy; and therefore it becomes unnecessary to consider the questions which would have arisen if he had given this proof. It becomes unnecessary to determine whether or not the descendants of Pryag Roy have failed, or on whom the burden of proof lies with respect to this issue. It is unnecessary to determine whether or not the defendants have shown that the grant was, as they allege, made to Anand Roy, nor to determine the truth or falsehood of the charge of forgery which has been preferred against them. If indeed the plaintiff had given any evidence whatever whereby he brought himself into Court, then the conduct of the defendants might have been material, for in such a case proof of the fraud and forgery on their part might have assisted the plaintiff's proof; but until the plaintiff has given evidence sufficient to bring himself into Court, all the subsequent questions become immaterial and unnecessary to be inquired into. This their Lordships understand to have been substantially the view of the High Court, who declined to go into these questions.

For these reasons their Lordships are of opinion that the plaintiff has failed to prove his case, and that the judgment of the High Court is right; and they will humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal dismissed with costs.

PRIVY COUNCIL.

The 8th May, 1873.

MAMARANEE BROJOSOONDURY DEBEA,

versus

RANEE LUCHMEE KOONWAREE

AND OTHERS.

*Appeal from the Calcutta High Court.**Religious Endowment—Alienation.*

When an endowment is merely nominal, and indications of personal appropriation and exercise of proprietary right are found, a sale of the property is valid under the Hindoo Law.

If a man merely purchases property in the name of his own idol, whom no one except himself has the power or right to worship, the property is not the property of the idol, but the property of the person who purchased it.

This suit was commenced on the 11th November 1867. It was brought by Moharajah Gobinda Nath Roy, who was the grandson and heir, through adoption, of Moharajah Ram Nath, *alias* Biswanath Roy.

The suit is against Ranee Luchmee Koonwaree and others. It was brought by the plaintiff as the shebaat of the idol Shyamsunder Thakoor, to recover a certain Zemindaree in Zillah Rajshahye, which he contends, was improperly assigned and sold by his grandmother Moharanee Kristomonee, the widow of Biswanath Roy.

The two important questions in this case are, first, whether the property was endowed for a reli-

gious purpose; and in the next place, whether the suit is barred by limitation.

With reference to the endowment, it appears that, on the 17th of Joistee 1206, about the year 1799, the Zemindary was sold for arrears of Government revenue. It was purchased for Rs. 5,005, and the name of the purchaser was entered as Shyamsunder Thakoor, that is the idol, "by the pen of Rughoonath Nundee." It does not appear who Rughoonath Nundee was, but he merely signed on behalf of the idol as the purchaser. Where the Rs. 5,005 came from does not very clearly appear, but there can be no doubt from the whole of the case that the money was supplied by the Moharajah Biswanath.

On the 18th August 1802, there was a bill of sale executed by Brojokishore Shaha, said to be a purchaser of the Zemindary, in favor of Rughoonath Nundee, but how Brojokishore Shaha got the property does not appear. How the idol, who had purchased at the auction, transferred his property, or by whom the property was transferred on behalf of the idol, does not appear; but it appears that Brojokishore Shaha re-conveyed or conveyed the property to Rughoonath Nundee as the gomastah. Rughoonath Nundee is described (I do not know whether it is very material) merely as the gomastah of the idol, whereas the Moharajah is described as shebaat. Whether there is any

material distinction between a gomastah and a shebaet, I am not aware, nor is it, I think, very important. Now the bill of sale says:—"In the course of business by Brojokishore Shaha, son of" &c., "in favor of Rughoonath Nundee (gomastah of the most worshipful Shyamsoonder," that is, the idol. "Having failed to clear and prepare, and pay the Government revenue of our purchased Zemindary Pergunnah Soojanuggur Sirkar Bhuggo Korat, within Chakla Bhadorea, the sudder land revenue of which said pergunnah, as per allotment, is recorded at Rs. 4,742—4 annas—14 gundas; and whereas there is no possibility of our doing so next year, we do of our own will and accord, in full possession of our reason and senses, in health of body, and without compulsion, sell to you," that is, to Rughoonath Nundee, the "pergunnah aforesaid, for a full consideration, of Rs 5,901." Where that money came from does not appear, but there is no doubt that it was the money of the Moharajah. A certificate of that sale was put in evidence, which does not carry the case any further, and the deed was registered.

On the 24th of Choitro 1211, a deed was executed by Rughoonath Nundee, conveying the property to the idol and the Moharajah shebaet. He says:—"This deed of agreement is executed in the course of business. Being appointed in the

office of gomastah,"—there he calls himself again "gomastah"—"on the part of the idol, I have purchased in the name of the god pergunnah Soojanuggur, from Tikhum Roy and Brojokishore. I having myself caused the bill of sale to be executed, my name is recorded in the bill of sale, certificate of sale, and bill of mutation of names as gomastah on the part of the god. And I now present the bill of sale, &c., under the hand of the Roy and Shaha before you, to enable you to present a petition to have the said pergunnah entered as a Zemindary in the name of the god and your own name recorded, as the shebaet thereof; and I accordingly agree and write this to the intent that you may have the names of the Roy and Shaha struck off from the Collectorate in respect of the said pergunnah, and have your own inserted in the office as a Zemindary in the name of the god, and yourself as the shebaet thereof." That document was also registered, and therefore any body could have discovered that the deed had been executed.

But the question is whether there is any evidence of an endowment properly so-called. Now what is the evidence of an endowment? This was clearly not an endowment for the benefit of the public. The idol was not set up for the benefit of the public worship. There are no priests appointed, no Brahmuns who have any legal interest whatever in the

fund. It is not like a temple endowed for the support of Brahmuns, for the purpose of performing religious service for the benefit of any Hindoo who might please to go there. It is simply an idol set up by the Moharajah, apparently in his own house, and for what purpose? Why, for his own worship. We constantly have suits claiming certain turns of worship but here there is no turn or right of worship established. There is nothing stated in any way to show that the Moharajah intended that the idol should be kept up for the benefit of his heirs in perpetuity; and before it can be established that lands have been endowed in perpetuity, so that they can never be sold and must be tied up in perpetuity, some clear evidence of an endowment must be given. What are the objects of the endowment? None of the essentials of an endowment are stated. The Moharajah appears to have purchased the property in the name of the idol, and that is all. Then he deals with the funds of the idol as if it were his own property. There is no evidence at all of any of the essentials of an endowment in favor of the idol.

In the case of Mohatab Chund and another in the 5th Volume of the *Sudder Dewanny Adawlut Reports*, 265, which was a very similar case, it was held that when an endowment is merely nominal, and indications of personal appropriation and exercise of proprietary

right are found, a sale of the property is valid under the Hindoo law.

It appears, therefore, to their Lordships, upon the authority of that case, and upon the principle of endowments, that this was not an endowment by the Moharajah in perpetuity for the benefit of the idol, so as to establish that the property so conveyed to the idol was to be property of the idol for ever and that nobody could alienate it. Suppose the Moharajah had established the idol in his house, would any body pretend that he could not sell his house? Well, then, what would become of the idol's temple in the house? He could sell the house, notwithstanding he had put an idol there; and what would become of the idol itself? Here there was no endowment, no priest, no public, no one legally interested in the worship of this idol, except the Moharajah himself, and nothing to show that the Moharajah intended to establish it for the benefit of his sons or heirs, or any body else, in perpetuity.

If there was not an endowment, the case appears to be very clear. The Moharajah having purchased the property in the name of the idol, mortgaged it to Komul Lochun Nundee for a sum of Rs. 32,000. Komul Lochun, not having been repaid, took steps to foreclose the estate, and the period of foreclosure was about to elapse when, the Rajah having died, and having

appointed his widow, Kristomonee, the manager and owner of the property, she came in and made an arrangement with Komul Lochun to extend the period; and she afterwards borrowed from Rajahs Woodmunt Singh and Janokeram Singh Rs. 46,400, with which Komul Lochun was paid off. The conditional sale was to pay off a debt due from her husband to Komul Lochun. Now, as a widow, she was entitled to alienate the property for the purpose of paying and discharging her husband's debts. After that the period for the repayment of the money to Woodmunt Singh and Janokeram Singh having elapsed, they foreclosed the estate against the widow Kristomonee, and brought a suit and recovered possession of the land, and were put into possession 47 years before the commencement of this suit.

The defendants claim under Rajahs Woodmunt Singh and Janokeram Singh. Rajah Janokeram Singh died, leaving Rajah Woodmunt Singh his heir; and the whole property then became established in him. He died, leaving two sons, and the sons conveyed the property to the defendants. It is unnecessary, however, to enter into the title of the defendants.

The question is, has the plaintiff any right to recover this property? The widow made a valid sale of it; and, even without the statute

of limitations, the defendants are entitled to it.

The Courts below have both held that there was no actual endowment. The Principal Sudder Ameen (although possibly all his reasons may not be correct) says:—"It is simply this, that the grandfather of the deceased purchased the property claimed in the name of the idol." Then he held that there was not an endowment, and that the property was the private property of the grandfather. The High Court say:—"No evidence has been given to show that there ever was any formal dedication of the property to the idol. It is a mere purchase in the name of the idol. From the time of the purchase of the property, Rajah Biswanath Roy appears to have dealt with it as his own."

In the case of *Gossain vs. Gossain*,* 6, Moore's Indian Appeals, it was held that if a Hindoo purchase property in the name of his son, the property is not vested in the son, but remains vested in the father who purchased; and so with regard to an idol. If a man merely purchases property in the name of his own idol, whom no one except himself has the power or right to worship, the property is not the property of the idol, but the property of the person who purchased it. The High Court say:—"From the time of the purchase of the property, Rajah Biswanath Roy appears to

have dealt with it as his own. In 1802 it was conveyed or mortgaged to one Bheekum Roy, and in 1812 it was mortgaged apparently for the Rajah's purposes. There is no proof that either the first or the second mortgage was executed in any way for the purposes of the worship of the idol, or for the performance of any trust connected with it. For all that appears the money was raised for the private purposes of the Rajah. No evidence has been given to show that the revenue of the property was expended for the purposes of the idol, and the pleader for the appellant, when arguing the case before us, was not prepared to go into evidence upon that point. We do not mean to rest our decision of the case on that point. But we may observe that we do not see any reason to doubt the correctness of the decision of the Principal Sudder Ameen that there was no real endowment."

Now both the Courts below have found that there was no real endowment, and their Lordships entirely concur in that finding. There was, therefore, nothing to deprive the purchaser of the power of alienation.

It is scarcely necessary to advert to the question of limitation. In this case 47 years have elapsed since those under whom the defendants claim purchased the property *bona fide*, under the belief that the foreclosure in favor of

nokeeram Singh was a valid title in those parties, and they purchased the property for a valuable consideration. The property has been out of the possession of the Molairajah's family for upwards of forty-seven years, and limitation is clearly a bar to the suit.

Under these circumstances their Lordship will humbly advise Her Majesty to affirm the decision of the High Court with the costs of this appeal.

PRIVY COUNCIL.

The 24th January, 1878.

SOORASOONDURIE DABEA AND
ANOTHER, *vs.* GOLAM ALI.

Appeal from the Calcutta High Court.

*Suit for Enhancement of Rent—
Middlemen.*

An intermediate tenant cannot be assessed according to the rent paid by ryots. A suit seeking to make the intermediate tenant liable to pay according to rates paid by ryots ought necessarily be dismissed.

If the plaintiff be not entitled to a decree for enhancement, he cannot also claim to have in that suit a decree at the rates admitted by the tenant.

The appellants are the executors and representatives of Gopal Lall Thakoor deceased, who was the plaintiff in the suit below.

The appeal is from a decision of a Division Bench of the High Court in Bengal, overruling a decision given in favor of the plaintiff by the Deputy Collector of Madarceepore, Zillah Backergunge.

The suit was brought on the 12th July 1866, to recover the sum of Rs. 5,120 for arrears of rent for the year 1272, in pursuance of a notice of enhancement served under the provisions of Section 13* Act X. of 1859, together with interest thereon, amounting altogether to the sum of Rs. 5,613-13-10 with costs and future interest.

The grounds of enhancement relied upon by the plaintiff were, 1st, that the value of the produce and the productive powers of the land had increased otherwise than by the agency or at the expense of the defendant; and, 2ndly, that the quantity of land held by the defendant was greater than the quantity for which rent had been previously paid by him.

The excess as regards the quantity of land held by the defendant and in respect of which enhancement was claimed, consisted partly of lands within the boundaries described in the Kubooleut under which the defendant held, partly of lands subsequently added thereto by alluvion.

It is necessary to consider, 1st, whether the defendant is liable to enhancement; 2ndly, if liable, whether he was liable to be enhanced as a middleman or as a ryot; and 3rdly, if liable only as a middleman, whether he was liable to be enhanced in the manner and to the extent claimed by the notice.

The defendant produced a document purporting to be a pottah executed by the plaintiff. It was contended on the part of the plaintiff, and found by the Deputy Collector, that the document was a forgery. Their Lordships are of opinion that the High Court was right in holding that it was not material to determine whether the alleged pottah was a forgery or not, for a kubooleut, dated the 4th Bhadro 1260, signed by the defendant, was produced on the part of the plaintiff, and was admitted by the defendant to be a genuine document. That document shows the nature and terms of the defendant's holding; * * * * By that instrument, after reciting that within the chur formed on the site of the old deluviated lands of the villages of Panchcotee and Chur Panchcotee, &c., bounded as therein mention, there were about 8 drones, 6 kanees, 8 gundas of jungle waste land fit for cultivation, for 8 annas whereof, viz. 4 drones, 3 kanees, and 16 cowries, the defendant had applied for a howaldarees amulnamah, at a rate of rent of Rs. 5 per kanee, without any rent for the then present year 1260; at the rate of Re. 1 per kanee for the year 1261; at the rate of Rs. 2 per kanee for the year 1262; at the rate of Rs. 3 per kanee for the year 1263; and at the full customary rate of Rs. 5 for the year 1264; it was declared by the defendant that for 4 drones, 3 kanees, and 4

* Section 14 of Act VIII, B. C. of 1869.

gundas of land within the boundaries therein mentioned, the said Gopal Lall Thakoor had granted a howladaree amulnamah according to the prayer contained in the said application, and the defendant then agreed as follows :—

“ We shall till cultivate the d. 4, k. 3, g. 4 (four drones, three kanees, and sixteen cowries) of land situate within the boundaries aforesaid, less rukba, at the rate of g. 4 (sixteen cowries,) per kanees, viz., k. 11, g. 4 (eleven kanees and sixteen cowries), that is, d. 3, k. 8 (three drones and eight kanees), and hold during the year 1260 without any rent, after which we shall continue to pay as rent according to the instalments mentioned below, year by year, and month by month,—in the year 1261, Rs. 56 (fifty six,) being at the rate of 1 rupee per kanees; in the year 1262, Rs. 112 (one hundred and twelve,) being at the rate of Rs. 2 per kanees; in the year 1263, Rs. 168 (one hundred and sixty-eight,) being at the rate of Rs. 3 per kanees; and in the year 1264, Rs. 280 (two hundred and eighty,) being at the full customary rate of Rs. 5 per kanees. We will not make any objections or excuses on the ground of drought, inundation, death of tenants, absconding of them, sandy land, fitness or unfitness for cultivation, cultivated or not cultivated, and the like, and even if we do, they shall not be admitted. In the

event of our making default in paying our rent according to the instalments, we will pay the arrear due with interest at the rate of 1 (one) rupee per cent. per mensem on the lapsed instalments. Should we neglect to do so, the arrear will be realized with interest according to the law for the time being in force. After the month of Pous of the year 1261 (twelve hundred and sixty-one) notice of 15 days will be issued to us from your office to file a kubooleut, specifying the quantity of land and amount of rent, according to measurements as per boundaries. In the event of our not attending before the ameen who may be deputed to make the measurement, and causing the measurement to be made and the rent to be fixed, the measurement will be made in our absence, and whatever quantity of land may be found on measurement to be cultivated or fit for cultivation, we shall be taken to have accepted and engaged for, as part and parcel of this howla; out of the same, the cultivated land in excess of the quantity mentioned above, less rukba, shall be charged with rent, which being added to the rent fixed at the rates mentioned above, we will pay from the year 1261. We will take a pottah according to the practice of your zemindary office after executing a kubooleut, specify the total quantity of land measured, with the rent thereof, at the rates mentioned above and progressive

rates, being exempt from the payment of rent for two years in respect of lands fit for cultivation, continue to pay rent according to the instalments and conditions mentioned in the kubooleut. We shall not be able to make any excuse or objection thereto, and even if we do, they shall not be admitted. To this effect we execute this kubooleut, having received the howaladaree amulnamah. Dated the 4th Bhadro, 1260."

It was admitted on the part of the appellant that the defendant was entitled to a perpetual right of occupancy so long as he paid the rent which the appellant had a right to demand; but it was contended on his behalf that the rent was not fixed beyond the year 1264, and was therefore subject to enhancement after that date. The defendant was a middleman and not a cultivator of the land. By the express terms of the kubooleut he was to have a howaladaree allowance at the rate of 4 gundas per kanee, and he agreed to make no objection or excuse in regard to the payment of rent on account of the death or absconding of tenants. Indeed it was admitted that the holder was a middleman and not a cultivator of the land himself. In his judgment the Principal Sudder Ameen said:—"It is admitted that the holder is a middleman ryot;" and he held that the tenure of the defendant was nothing more than a right of occupancy and that

he was liable to enhancement under Section 17, Act X. of 1859.

He said:—"The tenant or holder of such a tenure is, strictly speaking, a ryot with a right of occupancy, whether he cultivates the land himself or sublets to others, and is a middleman. For enhancement of such a tenure there is no other law but Section 17 of Act X. of 1859, which is necessarily applicable; notice under Clauses 2 and 3 of Section 17 served on the defendants, under Section 13 of the Act, is therefore valid at law."

Having held that the rent was subject to enhancement, he proceeded to try to what extent it ought to be enhanced. There was a contest before him as to what quantity was within the boundaries specified in the kubooleut; but he considered it entirely immaterial, and held that all the cultivable lands, whether included within the boundaries or not, ought to be assessed at the same rate. He found that, instead of Rs. 5 per kanee (the plaintiff having claimed 16 by his notice,) the rent ought to be rupees 10, 10 annas; and after deducting the howaladaree allowance at the rate mentioned in the kubooleut, there were 16 drones 10 kanees and 17 gundas of cultivable land fit for assessment (p. 415,) and that the jumma, according to that rate, was Rs. 2,881, 11 annas, 7 pie. He held that the defendant, being a middleman, ought to have an allowance of 10 per cent. for collec-

tion. Deducting that allowance, he considered that the jumma should be enhanced to Rs. 2,529, 12 As. 11 P. and gave the plaintiff a decree for the amount, with interest.

Upon appeal from that decision, the High Court held that, according to the terms of the kubooleut, there was a grant from the plaintiff to the defendant of a permanent tenure at a fixed rate of rent, and that the plaintiff's suit ought to be dismissed.

Mr. Justice Bayley, in delivering his judgment, said—

"It is impossible, I think to read this kubooleut without coming to the conclusion that the intention of the parties was that the lessee should clear and cultivate jungle waste on the terms of merely rent-free, or partly progressive jumma allowed in those cases (and not in the case of cultivated lands,) and that the full customary rent of Rs. 5 per kanee from 1264 was thereafter to be paid. I cannot think it reasonable or borne out by the deed that the lessor intended to prescribe, or the lessee intended to accept, terms such as that the lessee should bear all the expense and trouble of reclamation, and having done so, was, in the first year after the full rent would be paid, viz. after 1264, to be liable to make over the reclaimed land to his lessor, or to have it in 1265 enhanced to the highest rates of neighbouring cultivated lands as to which no jungle waste had to be cleared."

The kubooleut did not contain the term "*mocumrees*," or the words "from generation to generation," or any word to that effect, and the kubooleut was one of modern date, and there was not as in *Dhunput Singh's** case any long uninterrupted enjoyment at fixed unvarying rent. It was however admitted by both parties on argument that the tenure was a permanent one. It is unnecessary for their Lordships to express any opinion upon that point, and they therefore abstain from doing so. Looking at the words of the kubooleut, their Lordships are of opinion that it was the intention of the parties that, in and after the year 1264, the defendant should hold at the fixed rent of Rs. 5 per kanee and that consequently the rent was not liable to enhancement beyond that rate. It appears from the recital in the kubooleut that the defendant applied for a howaladaree amulnamah at the rate of Rs. 5 a kanee without any rent for the year 1260, and at varying rates less than Rs. 5 a kanee up to and inclusive of 1264, and that howaladaree amulnamah had been granted according to the defendant's

* 9, W. R., P. C., page 3.—"Where proof exists of long uninterrupted enjoyment of a tenure, accompanied by recognition of its hereditary and transferable character, it is sufficient to supply the want of the words "from generation to generation" in the *potlak*, and the tenant cannot be dispossessed by his superior,

prayer. The rent was to be payable by certain instalments, and the defendant agreed to pay it after 1260, year by year, and month by month, according to the instalments mentioned in the kubooleut. In applying for an amulnamah at the rate of Rs. 5 a kanee, it could not have been intended that the Rs. 5 should be the rent for the year 1264 only: it is a much more reasonable construction to hold that Rs. 5 a kanee was intended to be the rent for 1264 and during the remainder of the holding. The defendant, as a middleman, might be ruined if he were liable to have his rent enhanced in the manner contended for by the plaintiff. By the terms of the notice it was proposed to enhance his rent from Rs. 280, the amount fixed for the year 1264, to 5,120 Rs. for the year 1272. The notice was dated the 19th Cheyt 1271, and was served on the 25th or 26th, not many days before the end of that month. It does not appear what rent the defendant was receiving from his ryots, but he could scarcely have had time before the end of the month of Cheyt to serve his ryots with notices of enhancement for 1272; yet, according to Section 13, any notice from him to his ryots to be available for 1272 must have been given before the end of Cheyt 1271. Their Lordships are of opinion that the rent was not subject to enhancement beyond Rs 5 a kanee.

The defendant might be liable under Regulation XI. of 1825, Clause 1 of Section 4, to pay rent for the lands gained by alluvion; but this is not a suit merely to recover rent for those lands, or to assess them, but it is a suit to enhance the rent of the defendant, under Section 17, Act X. of 1859, upon the ground that he was liable to enhancement under that Section. The defendant was a middleman, and not a ryot, having a right of occupancy within the meaning of Section 17, Act X. of 1859, or liable to enhancement under that Section. If liable to enhancement at all, he could only be enhanced according to the pergunnah rate of the rents payable by similar holders. (Dhunput Singh's case, 11, Moore's Indian Appeal Cases, page 265,* and the case there cited with approbation.)

Their Lordships consider that this objection is fatal to the whole

* 9, W. R., P. C., 3.—“But if the respondents were tenants intermediate between the proprietor and the ryot, that fact seems to raise objections both of form and of substance fatal to the maintenance of the present suit. The notice on which it was founded did not in that case, accurately specify the ground on which enhancement of rent was desired; and the assessment on which the sum sued for was calculated was improperly made. Dyaram's case (1, S. D. A. Reports, 130); and the note of Sir Wm. Macnaghten at the foot of it, show that where the suit is against an intermediate tenant, the enhancement ought to be made according to the pergunnah rate of the rents payable, not by the ryots, but by the holders of similar tenures.”—Dhunput Singh.

of the plaintiff's case. In Dhanput Singh's case it was said—"To assess an intermediate tenant according to the rent paid by ryots, must necessarily deprive him of all beneficial interest in his tenure." According to the tenure of the defendant in the present case, he was not to make any objections on the ground of drought, inundations, death of tenants, absconding of them, sandy land, fitness or unfitness for cultivation, cultivated or not cultivated, or the like. He could not at any rate be liable to any higher rent than holders of tenures upon those terms.

In the present case, if the defendant was liable under Clause 3 of Section 17, to be assessed for land gained by alluvion beyond the boundaries mentioned in the kubooleut, upon the ground that the land held by him had been found upon measurement to be more than that for which he had previously paid rent, he would be liable to pay rent for the land outside the boundaries mentioned in the kubooleut, even though it might be sandy or unfit for cultivation.

It was contended on the part of the appellants that, even if they were not entitled to enhance the rent, they were entitled to recover rent at the rate specified in the kubooleut. Their Lordships are of opinion that a suit to enhance is very different from a suit to recover arrears of rent at the rate originally fixed, and that it is founded entire-

ly upon different principles. To a suit for enhancement, it would be no bar to plead that all arrears according to the original rate had been paid. No issue was raised, or could an issue have been properly raised in this suit as to whether the rent for 1272 at the rate specified in the kubooleut had been paid or satisfied; nor is there anything in the case to show whether it has been paid or not. Their Lordships are of opinion that the plaintiff is not entitled to a decree in this suit for the rent of 1272 at the rate fixed by the kubooleut. They concur with the High Court in thinking that the present suit ought to be dismissed with costs, and they will therefore humbly advise Her Majesty that the decree of the High Court be affirmed with the costs of this appeal.

CALCUTTA HIGH COURT.

The 9th April, 1878.

HINDOO WIDOW UNCHASTITY CASE. FULL BENCH DECISION.

(*The Hon'ble Sir Richard Couch, Kt., Chief Justice, and the Hon'ble F. B. Kemp, L. S. Jackson, J. B. Phear, A. G. Macpherson, W. Markby, F. A. Glover, D. N. Mitter, W. Ainslie, and C. Pontifax, Judges.*)

KERRY KOLITANEE (*Defdt.*) Appell.,
versus

MUNEERAM KOLTA (*Plaintiff*)
Respondent.

Held (Kemp, Glover and Mitter, J. J., dissentiente) that under the Hindoo law, as

administered in the Bengal school, a widow, who has once inherited the estate of her deceased husband, is not liable to forfeit that estate by reason of unchastity.

In this case the defendant, a Hindu widow, had succeeded to the estate of her husband, who had died intestate, and without issue. After her husband's death, the defendant gave birth to an illegitimate child. The plaintiff, her husband's cousin, therefore claimed to succeed to the estate, on the ground that she had forfeited it by her unchastity. The case was decided in his favor by the Deputy Commissioner of Seeksagur, who reversed the decision of the Lower Court. The defendant appealed to the High Court, and Mr. Justice Bayley and Mr. Justice Mitter, before whom the appeal was heard, referred the following questions for the opinion of a Full Bench by an order dated the 10th April 1872 :—

1ST.—*Whether, under the Hindu law as administered in the Bengal school, a widow, who has once inherited the estate of her deceased husband, is liable to forfeit that estate by reason of unchastity.*

2ND.—*Whether the forfeiture, if any, is barred by Act XXI. of 1850.*

The reference came on for hearing before a Full Bench of five Judges, who, without giving any opinion, referred it to a Full Bench of the whole Court.

COUCH, C. J. (Jackson, Phear,

Markby, Macpherson, Ainslie and Pontifex, Judges, concurring)—In this suit the following question has been referred to the Full Bench :—

“Whether, under the Hindu law as administered in the Bengal school, a widow, who has once inherited the estate of her deceased husband, is liable to forfeit that estate by reason of unchastity.” Up to the time of the reference, there had been no conflict of decisions in this Court, the only case being *Srimati Matanginee Debi, vs. Srimati Joy Kali, V.*, Bengal Law Reports, 466, where the decision of Mr. Justice Markby, that a widow did not forfeit her right, was affirmed by the Chief Justice Sir Barnes Peacock and Mr. Justice Macpherson. But the learned Judges, who have referred the question, state that they feel themselves bound to say that that decision is contrary to Hindu law; and we are in effect asked to overrule it. The authorities bearing on the question, and the reasons for an opposite decision, are very fully and elaborately stated by Mr. Justice Mitter in the referring judgment.

I propose, first, to consider that judgment, and will afterwards refer to any authorities or arguments that have been produced which are not in it. It first notices that the authorities in the different schools of Hindu law appear to be unanimous in holding, that an act of unchastity is one of the gravest delinquencies of which a woman can

be guilty. The texts cited need not be repeated here, and it may be allowed, as the judgment says, that "they are in full unison with the feelings of the Hindu community in general, and that the social *status* and privileges of Hindu women are still ordinarily determined and regulated by them." They may be, as is also said in the judgment, a valuable guide in the present discussion, but it must be kept in mind that the question is, what is the doctrine that has been received by the Bengal school, by the law of which this case is governed, and that has been sanctioned by usages.

It is then remarked that the estate of a widow under the Hindu law is one of a very peculiar character; which is now so fully understood and admitted that I need not refer to the authorities upon it. And then it is said: "Indeed, according to the true theory of the Hindu law, she is nothing more than a trustee for her life for the soul of her deceased husband, if we may use the expression." The words "if we may use the expression" show that the learned Judges felt they were speaking figuratively, to which there can be no objection if care is taken to distinguish the figurative from what it resembles, and not in reasoning to substitute the former for the latter. I may here quote the words of Lord Westbury in *Knox vs. Gye*, Law Reports, 5, B. and L. Appeals,

675:—"Another source of error in this matter is the looseness with which the word 'trustee' is frequently used. The surviving partner is often called a 'trustee,' but the term is used inaccurately..... It is most necessary to mark this again and again, for there is not a more fruitful source of error in law than the inaccurate use of language. The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration, in other words, a complete trustee, holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor." But, in truth, the word 'trustee' ought not to be used, at least in the sense which is ordinarily attributed to it, and if used in any other, it proves nothing. A widow is not a trustee. She has the usufruct as well as the property in the thing inherited from her husband. Thus Vyasa, as quoted in the judgment, says: "For women the property of their husbands is intended only *for use*; let them not make waste of it on any account." And the text of Katayana, also quoted, is: "Let the childless widow, keeping unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property after his death."

It is true that Sir William Macnaghten, in his *Principles of Hindu Law*, 20, speaking of the estate to which a widow succeeds, says:—"She can be considered in no other light than as a holder in trust for certain uses;" but he goes on to say "that should she make waste, they who have the reversionary interest have clearly a right to restrain her from so doing," not that by making waste she forfeits her estate.

It is then remarked, that "it should not be supposed that these provisions were intended by their framers as mere moral precepts, which the widow is at liberty to obey or disobey at her pleasure; on the contrary, the utmost precaution is taken by them to secure their strict enforcement." But, as there is no text that if she disobeys she shall lose her property, it may be inferred that it was not intended she should. Texts are then cited to show that, in the disposal of her property, and care of her person, a childless widow is subject to the control of her husband's family, and the widow's estate is compared with that of a male heir under the Hindu law. In both cases the spiritual welfare of the deceased proprietor is the only test resorted to for determining the right of succession; and it is remarked that no effective restriction whatever is put upon the right of enjoyment of the male heir; that the reason for this distinction between male and

female heirs is that women are incapacitated from performing the ceremony of *Parvuna Shrad*, which constitutes, as it were, the very corner-stones of the Hindu Law of Inheritance. This applies to all female heirs, and we are asked, in the absence of any positive text, to make a distinction between the widow and other female heirs, and to declare that she is to forfeit her estate if she fails to perform her duties, whilst they do not. But it has not been attempted to be shown that there is more reason for the widow to forfeit the estate on account of unchastity, and because her acts are thenceforward inefficacious for the repose of her husband's soul, than for an unmarried daughter to forfeit the estate upon the death of a childless husband, with whom, after her father's death, she may have intermarried, and by whose death childless, she ceases to be efficacious in bestowing benefit on her father's soul.

The widow, chaste at her husband's death, takes as "half her husband's body," and for performing works efficacious for his soul. The daughter, unmarried at her father's death, takes because she is "as it were himself" (*Daya Bhaga*, Chapter 11, Section 2; Verse 1); and because she is equally with the son, "a cause of perpetuating the race," and Verse 7 "confers benefit on her father by means of her son." It is clear from Verse 80 that the issueless widowed daughter

ter, in whom, as a spinster, the estate had vested, would retain it until her death, although, after her husband's death she would be wholly inefficacious to confer the benefits for which she had been selected to take. If it be said that she may still continue of herself to perform certain acts efficacious for her father's soul, the answer is that those qualities are not the qualifications or conditions for her selection to take the estate. Had she been a childless widow at her father's death, she would have been passed over, notwithstanding the possession of such qualities. The reason for her taking the estate is, not the efficacy of her own acts, but the efficacy of the acts to be wrought through her son. It is then observed in the judgment that if we were to guide ourselves solely and exclusively by the texts in the *Mitaashara* and *Daya Bhaga*, it would have been extremely difficult to come to any satisfactory solution of the question one way or other. In fact, as is said by the Judicial Committee of the Privy Council of the text in the *Mitaashara*, they are wholly silent as to the disabilities of the woman, or the nature of the interest which she takes in her husband's estate. If the doctrine contended for has been received, it must have been originated by later commentators. I pass over the remarks upon the Full Bench decision, but I think it would be very difficult to recon-

cile it with what we are now asked to declare to be the law. It has been so generally noted upon that we must consider the decision to be the settled law, until the contrary is declared by a higher tribunal. The judgment then says: "Such then being the nature of the estate inherited by a Hindu widow, every act done by her, the effect of which is to incapacitate her from using that estate for the only purpose for which she is entitled to use it, operates as a cause of forfeiture," and, after citing texts which show "that an unchaste woman not only causes 'the loss of her husband's soul,' but she is totally incompetent to redeem it afterwards, inasmuch as every act done by her subsequent to the loss of her chastity must be necessarily destitute of all religious efficacy whatever," it says: "As half the body of her deceased husband she took it as a trustee for the benefit of his soul; but if she is no longer in a position to fulfil her duties as such trustee, the trust property must be taken away from her as a matter of course."

I will consider these two propositions separately. The first assumes that the continuance of the estate in the widow is conditional upon her using it for the intended purpose. Otherwise the incapacity would not cause a forfeiture; for it is not said that the forfeiture is to be considered as a punishment, and no text has been produce

show that it can be regarded in that light. But whether the estate is a conditional one is the question we have to determine; and it is admitted that the texts under which the widow takes the estate are silent as to her disabilities or the nature of the interest which she takes. "In the Mitacshara, Chapter 2, Section 1, Verse 6, the following texts are given:—"The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation, and obtain (his) entire share."—Vridhdha Menu. "The wealth of him who leaves no male issue goes to his wife; on failure of her, it devolves on daughters; if there be none, it belongs to the father; if he be dead, it appertains to the mother."—Virhad Vishnu. "Let the widow succeed to her husband's wealth, provided she be chaste; and in default of her, the daughter inherits if unmarried."—Katayana. Chastity is declared to be the condition of her taking the estate; but there is no condition declared as to her keeping it.

The second proposition uses the word 'trustee' and asserts that if a trustee is not in a position to fulfil his duties, the trust property must be taken from him as a matter of course. If this is intended as a proposition of Hindu law, no authority is cited in support of it, and I am not aware of any. As a doctrine of Courts of Equity in Eng-

land, it is not correct. The remedies for a breach of trust are stated in a work of high authority, *Lewin on Trusts*, Chapter 27; but the taking away the trust property is not among them, and it has been found necessary to provide for the disability of a trustee by infancy or lunacy by Acts of Parliament. There appears to me to be a fallacy in the proposition. The possession of the trust property is not essential to the performance of the duties. If the widow had sufficient property of her own to maintain herself, she might alienate the whole of her husband's property for her life, and still perform all her duties for the benefit of her husband's soul. In fact, there is no trust attached to the property. It is to personal obligation on the widow, and the proposition really is, that if she does not fulfil it, she shall be deprived of her estate. We must see whether that is a received doctrine in the Bengal school of Hindu law. It is then said that the conclusion that the estate must be taken away from her as a matter of course is not wanting an express authority to support it; and texts are cited which show that it is only a chaste widow who is competent to perform the religious and other acts conducive to the spiritual welfare of her husband. Also a text of Vyasa is cited, which says: "After the death of her husband, let the virtuous widow observe strictly the

duty of continence; and let her daily, after the purification of the bath, present water from the joined palms of her hands to the manes of her husband;” and enumerate other duties. “It is clear,” says the judgment, “that, according to the author of the *Daya Bhaga*, there are two reasons for allowing the widow to succeed to the estate of her deceased husband, namely, first, because she can rescue him from Hell by living in the mode prescribed by the Hindu shastras; and, secondly, because she might cause his soul to fall into a region of torment by doing improper acts through indigence.” Let this be granted. The reasons for allowing a person to succeed to an estate are not necessarily the conditions upon which he is to hold it. In the case of the male Hindu heir it is admitted they are not. And the description of the person who is qualified to succeed to an estate has not the force of a condition by which the estate will be defeated if the qualification afterwards ceases, as is before shown in the case of a daughter being an issueless widow. The last text referred to is from *Katayana*, cited in the *Daya Bhaga*:—“Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it.” This may, no doubt, be read as making the enjoyment conditional on keep-

ing unsullied the bed of her lord; but it may also be only an injunction to do so, as in the text of *Vyasa*, “Let the virtuous widow observe strictly the duty of continence;” and the way in which it is used by the author of the *Daya Bhaga* seems in favour of this. The passage (Chapter II, Section 1, Verse 56) begins: “But the wife must only enjoy the husband’s estate after his demise. She is not entitled to make a gift, mortgage, or sale of it. Thus *Katayana* says, &c.” If Mr. Colebrooke had thought that the works of *Vridhdha Menu* and *Katayana* were intended to make the enjoyment of the estate conditional, I think he would have made it clear in his translation that it was so. If the injunction is to have the force of a condition, and the violation of it is to cause a forfeiture of the estate, the Full Bench decision cannot be supported, because the whole estate of the widow would be forfeited by an alienation, and the heirs would take it. I think this text cannot be considered as a declaration that the enjoyment of the estate is subject to the condition of remaining chaste. The decision of the Privy Council at page 97 of the *Vyavastha Durpaua* does not appear to me to give any support to the opposite view. The next friend of the widow, an infant, sued to have the property belonging to her husband. She had removed from the protection of her husband’s family, but it was not pre-

tended that she had done so for unchaste purposes. The only question that could be put to the pundits was, whether, by ceasing to reside with the family of her husband, she forfeited her right of succession. They could put their opinions upon no other ground. If their answer implies that the estate would be forfeited by unchastity, they went beyond the question put to them. It is certainly settled by that decision that one part of the injunction in the text is not conditional; and it follows from the form of it that the other part must receive the same construction. This applies also to the text from *Vrid-dha Menu*. Some authorities current in the Bengal school are then cited. Of two of these, *Sree Kishen Turkolankar* and *Rughoonundun*, I need only say that it does not appear whether they are speaking of the right to inherit, or to keep the property after it has been inherited. A wife's right to inherit on the death of her husband may be said to cease on her becoming unchaste. *Juggonath Turkopunchanun*, the last authority cited, and one of the most modern of the Bengal school, is in favour of the doctrine that the interest of a widow is forfeited by unchastity. Of the texts which are then cited to prove that the Hindu law goes to the length of declaring that a woman who is guilty of unchastity is liable to forfeit even her *streedhun*, or peculiar property, it may be said

that if they do not prove that, they do not assist the argument. And if they do, the forfeiture is declared by positive texts, which shows that they were thought to be necessary. Also some of these texts seem rather to refer to acts in the husband's life-time. As to the remark that an unchaste woman no longer remains half the body of her husband, her estate must necessarily come to an end. I think it may be said that the estate cannot be considered as still the husband's, otherwise a son would not take in preference to the widow. On the husband's death, the estate ceases to be his. The being half the body of her husband is the reason why the widow is preferred to a daughter.

The objection which does not appear to me to be supported by authority, and has no weight in my opinion, that, according to the Hindu law, an estate once vested cannot afterwards be divested, is met in the judgment by the introduction again of the trust; but here it is said that the estate is *in the nature* of a trust estate,—a change of expression which, I think, indicates some uncertainty in the minds of the learned Judges as to there being a trust attached to the estate. It appears to me that this idea of a trust pervades the whole of the judgment, and I think I have shown, not only that there is no real trust, but that, if there were, forfeiture would not be the consequence of it.

The judgment then discusses the decisions of Courts of Law and the opinions of European writers on Hindu law. The first case mentioned is in the 2nd Volume of Macnaghten on Hindu Law, page 20. It is stated that a person died leaving a widow and a brother of the half-blood, and, subsequently, to his death the widow violated the hitherto unsullied bed of her husband, and had a child by a paramour of another class, while the brother's conduct was consistent with his religion, and the question is put—which of the two is entitled to succeed to the property of the deceased? The answer is: "It is the general doctrine that the virtuous widow of a man who dies leaving no heir down to the great-grandson succeeds; but that if she, on the death of her lord, be faithless to his bed, she has no right of succession; consequently the widow in such case would be excluded by her husband's half brother." The words "she has no right of succession" must, with reference to the facts stated, be taken to mean that she loses or forfeits the estate, but it is open to the remark that the texts cited do not directly support the opinion. It is the deduction of the pundit from them. The next case is at page 21 of the same volume. In the question it is uncertain whether the widow had become a prostitute, and had violated her husband's bed before or after his death, and the answer is: "If

it be proved, that the widow, in fact, did not keep her husband's bed unsullied, she has no title to his property, and ought to be expelled from his house." It is doubtful whether this is an authority upon the question now before us. The next case is at page 112, where it is stated that the woman became pregnant after the death of her husband, the fruit of an adulterous intercourse. The answer is: "A virtuous widow of a person who leaves no male heir down to the great-grandson succeeds her husband, and if she violate his bed, she becomes degraded; consequently, the widow described has no right to her husband's heritage, and cannot claim her maintenance, even though she obtained an agreement for her subsistence previously to her offence." The texts of Vyasa and Katayana, enjoining that a widow shall remain chaste, are cited as the authorities. It is to be observed that it is said that she becomes degraded, and consequently has no right to her husband's heritage; and it seems to be considered that the loss or forfeiture of the estate is caused by the degradation or loss of caste. Indeed, it is possible that it was assumed in the other cases that there had been loss of caste. In the case in VII., Select Reports, 144, a widow was held to have forfeited her claim to maintenance by eloping with a paramour. There was no question as to the forfeiture of an estate in-

herited from her husband, for there was an adopted son.

In the case in the *Sudder Decisions*, 1858, page 1891, the wife had eloped in the life-time of her husband, and there is no doubt that the right of succession is forfeited by that.

As reported in *Montrieu's Reports*, 314, the case of *Doe d. Radha Monee Raur, vs. Nilmonnee Dass*,* is an express decision by four Judges of the Supreme Court, that a Hindu widow forfeits her right to the husband's estate by incontinence after her husband's death. The report is very brief, and appears to have been taken from the notes of Chambers, C. J. It was decided in 172, and is mentioned in the note to *Doe d. Saum Monee Dassee, vs. Nemy Churn Dass*, 2, *Taylor and Bell*, 300, Mr. *Montrieu's Reports* not having then been published. The decision of Sir *Lawrence Peel* in the latter case seems to be founded on the assumption that the forfeiture was consequent on loss of caste, as he applies Act XXI. of 1850 to it. It seems probable that the opinion of Sir *Thomas Strange* was then the received doctrine in the Supreme Court. Mr. *Colebrooke's* opinion in 2, *Strange*, 272, is, no doubt, open to the remark made in the referring judgment, that was given in a case which originated in *Trichinopoly*; nor does it appear that it was given with any reference to the authorities current in the Ben-

gal school. But the case in 2, *Macnaghten*, 112, is a Bengal case, and the opinion there agrees with *Colebrooke's*.

Elberling, 73 and 75, and *West and Buhler*, 99, are cited as supporting the opinion of the referring Judges. *Elberling* at page 73 says: "The enjoyment of the property is given her (the widow) upon two conditions: 1, that she remains chaste; 2, that she does not make waste;" and at page 75:—"A widow is to reside in her husband's family; yet, as she forfeits her right to the property only by not remaining chaste, or by making waste, the mere residing with her own family cannot cause a forfeiture of her right to the enjoyment of the property if it be not done for unchaste purposes." And he cites the text of *Katayana*:—

"Let the childless widow, &c."

If *Elberling* be correct, that the enjoyment of the property is conditional, it must be forfeited as well by the breach of one condition as of the other; and upon an act of waste the estate of the widow would be determined, and the property would pass to the heirs of the husband. This, I believe, has never been held to be the law. In *West and Buhler*, 99, it is said that a widow, having married herself to another husband by the "Pat" ceremony, had forfeited her right of heirship; but at page 299 the question is put: "A woman of the *Dorik* caste, having lost her hus-

* *Montrieu's Hindoo Law Cases*, 314.

band, became the mistress of a man of (another) Shudra caste, and had a daughter by him—can she claim to be the heir of her husband?" The answer is: "A woman who was chaste at the death of her husband becomes his heir."

The "remark" by the authors upon this is: "According to Strange, El. H. L., adultery divests the right of a widow to inherit after it has vested. On other hand, the Shaster's opinion seems to be supported by the *Vira-Mitradoya*, where it is said (f 221, p 2, 18): 'And these persons (those disable to inherit) receive no share only in case the fault was committed or contracted before the division of the estate. But after the division has been made, a resumption of the divided property does not take place, because there is no authority (enjoining such a proceeding).'" And noticing the opinion of Colebrooke, they say the authorities quoted by him do not support the view that any forfeiture of property necessarily attends expulsion from caste. In the next page, there is an opinion that "a widow who remarries cannot be considered a faithful wife. She cannot therefore claim the property of her first husband." It is difficult to reconcile these opinions. Another authority cited in the argument before us for the respondent is Colebrooke's Digest, B. 6, Ch. 9, V. 484, which read with the previous verse, says that a woman

who takes delight in being faithless to the bed of her husband is held unworthy of property which has been promised to her by him as her exclusive property, and it was argued that *à fortiori* she would be of property inherited from her husband. There is a material difference between the two cases. Allowing that the word translated 'wife' means also 'widow,' the not giving that which has been only promised is different from taking away what the widow has actually succeeded to by virtue of the law of succession, and is in the enjoyment of Mr. Burnell's translation from the *Vyavahara Kanda* of the *Madhava*, page 31, was cited. The passage appears to refer to the succession of the wife on her husband's death, and not to her subsequent enjoyment. The judgment of the Privy Council in *Kashinath Bysack, vs. Horo Soodari Dasi*, *Vyavastha Durpana*, 97, was relied upon as showing that the decision in *Montrion's Reports* was considered as law; but the question of forfeiture by unchastity did not, as I have already remarked, arise in the case and it was sufficient for the Judicial Committee to say that the widow did not forfeit her right of succession by removing from the brothers of her late husband.

In a case in IV., *Bombay H. C. R.*, 25, A. C. J., also cited, the Court held that if the inheritance be once vested in the widow, it is

not by Hindu law, liable to be divested, unless her subsequent incontinence be accompanied by "loss of caste, unexpiated by penance, and unredeemed by atonement," citing 1, Strange, H. L., and adopting the words in page 136, and referring to Mr. Sutherland's opinion, Volume II., 269, that the degradation is the cause of exclusion from inheritance. It was argued that as maintenance is forfeited, the estate of the widow should be also. But the text of Naroda is "Let the brothers allow maintenance to his (deceased's) women for life, provided these preserve unsullied the bed of their lord; but if they believe otherwise, the brethren may resume that allowance,"—Vyavastha Durpana, 29. And in Mr. Burnell's work, page 30, a text of Naroda is given,—“If any one among brothers dies or renounces worldly affairs (*i e.*, becomes a religious mendicant), and leaves no issue, the rest may share his property, except the streedhana, and let them support his wives as long as they live, if they preserve undefiled the bed of their husband; but from others they may resume it (the streedhana.)” Thus we have in this case an express text authorizing the resumption. The absence of any text authorizing the heirs of the husband to resume the estate after the widow had succeeded to her deceased husband's property is relied upon as showing that it cannot be divested. And

this argument is strengthened by the fact that in another case there is an express text.

Besides, the argument drawn from these texts is founded on an alleged but false analogy between a widow's estate and a widow's maintenance. In the former case, the estate is given to her by express words, and is nowhere expressly taken away, and whilst hers it is independent of other ownership, her enjoyment being only, according to the texts subject to the advice or control of her male relatives. But maintenance is not so much a right in the estate of another as a duty of that other to be performed towards all those who but for the intermediate existence of himself might be entitled to the estate. "Let them allow a maintenance" assigns a duty to the owner rather than a right to the widow, although such duty may be enforceable by a widow who is without reproach. Moreover, the verses, Mitacshara, Ch. 2, Section 1, Verse 37, and Mayakha, Ch. 4, Section 8, V. 2, would seem to show that even the incontinent widow of one who has actually possessed the estate is entitled to maintenance for her life.

It was argued that in the Benares school property inherited by a woman from her husband is classed among streedhun, and therefore these texts would apply to it. And that it is the same in the Mithila school. Whether this be so according to the Mitacshara is at least

doubtful. The contrary has been held by the High Courts both at Madras and Bombay, 2, Madras, 291; 2, Bombay H. C. R., 14; and apparently in the Privy Council also, 11, Moore, 1, A., 487. It is certainly not so in the Bengal school, by the law of which we are to be governed in this case. I think I have now noticed all the arguments and authorities produced on the part of the respondents, and most of those for the appellant, the argument for whom was rested mainly upon the absence of any text that the estate of the widow should be divested if she became unchaste. And also upon this that, although by the Hindu law, there are various causes of exclusion from inheritance (Daya Bhaga, Chapter 8) when the estate is once vested, it is not forfeited by the subsequent existence of any of them. In a cause in the Sudder Dewanny Adawlut Reports for 1854, page 244, it was held that a person who has once succeeded to property is not to be disposed of it, if he subsequently becomes insane. It was urged by the respondent's pleader that there being no positive text governing the case, we must look to the principles of the law to guide us in determining it, and that the five texts afforded ample analogy, quoting the words of the Judicial Committee in 3, Moore, 1, A., 608. There the question was how the property descended, and it was absolutely necessary to determine it. Here the estate is by po-

sitive text vested in the widow, and there is no necessity to determine that it shall be taken away from her, or to go beyond what has been declared by the texts to be the law. I think we are not at liberty to declare a doctrine, which is not shown to have been received and sanctioned by usage to be the law, because it may seem to be analogous to a doctrine that has been received. Giving all the effect they deserve to the arguments founded upon the *status* of women under the Hindu law, and the peculiar character of a widow's estate, I still am of opinion that the estate once inherited is not forfeited simply by unchastity.

I therefore answer the first question in the negative, and it is unnecessary to answer the second.

Jackson, Phear and Markby, J. J., delivered judgments, substantially concurring with the Chief Justice. *Macpherson, Ainslie and Pontifex, J. J.*, simply concurred with the Chief Justice. *Kemp, Glover and Miller J. J.*, held an opposite opinion.

CALCUTTA HIGH COURT.

The 16th April, 1873.

PEAREE BEWAH, Plaintiff,

versus

NOKOOR KURMOKAR, Defendant.

Rent suit—Land for building purposes—Jurisdiction of Small Cause Court.

A suit for rent of land used for building purposes is cognizable in the Small Cause Court.

Reference to the High Court by the Off. Judge, S. C. Court, Sealdah.

CASE.—The plaintiff sues to reco-

ver from the defendant, Rs. 14-5-6 on account of rent for 4 cottahs of land, admitted by both parties to be used for building purposes, situated at Soora, in the Twenty-four Pergunnahs, from Bysack 1277 to Magh 1279, being two years, four months, and ten days, at 6 annas 6 pies a month.

Defendant pleads that the case is not cognizable by the Small Cause Court, as the suit is one for rent which should be tried by the ordinary Civil Court.

The issue is whether or nor this case, being of the nature above stated, is cognizable by my Court being a Moffussil Small Cause Court. I am myself of opinion that the case is cognizable in a Moffussil Small Cause Court, as the rent claimed is ground rent on account of land admitted to be "bastoo," i. e., used for building purposes. The Full Bench Ruling of the High Court dated the 26th June 1872, Case No. I. of 1872, Sutherland's Weekly Reporter, Vol. XVIII,* p. 234, appears to

authorize the trial of such suits by the ordinary Civil Court. But as in XVII,* Weekly Reporter, p. 178, a distinction is drawn between ordinary Civil Courts and Small Cause Courts, and I am not aware of any High Court Full Bench

a right of occupancy of land used for building purposes at a permanent rent may depend in some cases upon the terms of the original letting or upon equities arising out of the landlord's conduct, the suit for a higher or enhanced rent seems to be properly cognizable in the ordinary Civil Courts."—*Couch, C. J. (Ainslie and Bayley, J. J. concurring.)*

* This was a suit to assess rent at an increased rate and to have a decree for rent at such rates. "It seems to us that the suit before us is not one which can be characterized as a claim for rent, that is, a claim for rent within the meaning of Section 6, Act XI. of 1865. We think the claim mentioned in that Section must mean a claim for rent due under a contract between the parties, or a claim arising out of the occupancy of the land by the defendant, so that, ordinarily, the plaintiff would be entitled to recover rent from him. But this is a suit of a different description. The defendant seems to have been occupying, or his ancestors seem to have been occupying, the land under the plaintiff, and what the plaintiff seeks in the present suit is to obtain a declaration from the Court that the defendants are liable to pay a larger amount of rent, and to compel them to enter into a contract for the payment of that larger amount of rent. It may be that the suit is one which the plaintiff could not maintain; but if maintainable, it is maintainable, we think in the Ordinary Civil Courts, and not in the Courts of Small Causes."—(*Jackson and Glover, J. J.*)

* "The erection of a building upon the land, with the consent of the landlord, does not give to the occupant a right to hold the land perpetually at the same rent. If his rent was liable to be raised before, it would be so still unless the circumstances amounted to an implied contract on the landlord's part that he should always hold at the same rent, or in fact to the grant of a perpetual tenancy at a fixed rent which would be determined by the Court in a suit between them, And when we consider that

the Judge, recognizing the heinous nature of the offence committed, yet considers that there are circumstances which go to mitigate punishment, or make the prisoner an object of leniency. In such a case no doubt the High Court may enquire into these circumstances, and although it is generally reluctant to do so, may take a different view of the discretion which ought to have been exercised, and may enhance the punishment. But there is another view of the case in which the duty of the High Court will arise, and that is, where no circumstances of mitigation have been set forth, and where without any sufficient reason the Court convicting the prisoner has awarded a punishment, which is in ordinary cases quite inadequate in respect of the offence committed. I think it is the duty of the High Court in such a case—a duty which the Legislature has in Sections 280 and 297 specially imposed upon us—to take care that the inferior Criminal Courts do not, by the infliction of lenient punishments, give, as it were, encouragement to the commission of serious offences.—*C. H. C., the 12th May 1873; Goojree Panday, XI., B. L. R., App., p. 3.*

Mode of referring under Section 296, of Act X. of 1872.

Couch, C. J.—Let the Sessions Judge be told that the Circular

Order dated the 15th of July 1863, which applied to references under Section 434, of the late Code, is applicable to references under Section 296, of the present Code of Criminal Procedure, and that if he is of opinion that the judgment or order is contrary to law, or that the punishment is too severe, he must report the proceedings to this Court in the manner prescribed by that Circular.—*Rajkristo Paul, (C. H. C.), 11th July, 1873.*

CALCUTTA HIGH COURT.

The 10th July, 1873.

QUEEN,

versus.

LUCKY NARAIN DUTT.

Criminal Procedure Code—Section 346.

All examinations of accused persons are to be recorded in the language in which they are given. There is nothing in the Procedure Act, which necessitates a Magistrate to take down such examinations in his own hand. It is enough that he append a certificate that the examination was conducted in his presence, and contains accurately all that was stated by the accused person.

GLOVER, J.—Under the circumstances we do not think it advisable to confirm the sentence of death passed by the Sessions Judge, and alter it accordingly to one of transportation for life.

The attention of the Extra Assistant Commissioner should be drawn to Section 346 of the Code of Criminal Procedure, under which, as has been ruled by this Court, all examinations of accused

persons are to be recorded in the language in which they are given.

There is nothing in the Procedure Act which necessitates a Magistrate to take down such examinations in his own hand. It is enough that he append a certificate that the examination was conducted in his presence, and contains accurately all that was stated by the accused person.

In this particular case the deposition of the Extra Assistant Commissioner proved the fact of the accused's having made the confession as stated, but there might very easily be cases in which the omission on the part of a Magistrate to carry out the provisions of Section 346, Code of Criminal Procedure, might cause a failure of justice.

Opium—Possession—Act XXI. of 1856, Sec. 53.

The servant of a *maddad* vendor was found in possession of a quantity of opium other than that supplied from the Government stores. He said that he obtained it from the wife of the vendor, and that the wife had purchased it from an opium cultivator, *held* that the *maddad* vendor, the accused, could not be convicted under Sec. 53, Act XXI. of 1856, as it had not been shown that the purchase by his wife was authorized by him and therefore her possession of the opium or that of the servant could not be considered the possession of

the accused.—XX., *W. R.*, p. 54, *Gunesh Mann*, 26th July, 1878.

CALCUTTA HIGH COURT.

The 7th May, 1878.

KHETTERMONEE DOSSEE,

versus

SREENATH SIRCAR AND ANOTHER.

Manner of recording evidence—Act X. of 1872, Sections 332, 333, 334 and 330.

An error in omitting to record evidence in the mode prescribed by section 334 and the following sections, where it is necessary to do so, was considered to be an error so material that under Sec. 297 the High Court was bound to quash the proceedings, and set aside an order as being founded on no evidence.

JACKSON, J.—This is a case referred by the Officiating Sessions Judge of the 24-Pergunnahs, under Sec. 296, Act X. of 1872, for the purpose of annulling, under the powers of revision vested in this Court, the proceedings of the Joint Magistrate of Diamond Harbour, in that district, who on the 12th February 1873, made an order for the attachment of some 57 bighas of paddy lands, and also gave orders relating to the disposal of the crops which had been previously cut by order of the said Joint Magistrate.

The Sessions Judge has pointed out four particulars on which he considers the proceedings of the Joint Magistrate irregular, and we have before us the Joint Magistrate's letter dated the 24th April last, in which he offers an explanation of those proceedings.

BOMBAY HIGH COURT.

DHNEROO JEEVAN,

versus

FAZILLA CASSUMBHOY.

Limitation of Suits.

Where the will of the testator did not authorize the executor to carry on a mercantile business but only to collect the debts, *held* that the course of limitation ran from the testator's death and any fresh dealing by the executor did not constitute a fresh period of limitation.—(*Marriott, J.*) *October 18, 1873.*

PATEL JEW KISHOREDASS,

versus

THE SECRETARY OF STATE.

Nominal damages to be awarded where the extent of the actual damage cannot be ascertained.

In a suit for damages for breach of contract, the infraction of the contract was proved, but there was no evidence before the Court to arrive at the amount of the damage, *held* that nominal damages could only be given as the extent of the actual damage could not be determined. [Judgment was given against the defendant (the Secretary of State) one Rupee as damages together with all the costs of the action. The suit was for Rs. 123,294.]—(*Sir Charles Sargent, J.*) *13th October, 1873.*

CALCUTTA HIGH COURT.

Construction of Plaint—Cause of Action—

Jurisdiction.

Where a plaint set forth that

the late D gave plaintiff a note written in Calcutta and addressed to C, asking C to pay plaintiff Rs. 650, and plaintiff sued D (resident at the time in Mymensingh) on the allegation that the money had not been paid, the Moonsiff of Dacca considering, upon the allegations made, and having regard to Act VIII. of 1859, Sec. 139, that the suit was brought, not upon the promissory note, but upon the original cause of action, *viz.*, a contract made in Dacca for the sale of land (in Assam), and finding that the money was due in Dacca, considered himself to have jurisdiction, and tried the suit. In appeal, the Judge reversed the decision on the ground that the Moonsiff had no jurisdiction. Held, by Markby, J., (Birch J. concurring) that taking the plaintiff's cause of action in the way in which the Moonsiff has taken is to some extent a departure from his plaint, but it is not a departure wider than that allowed in the case of *Joseph, v. Solano*,* reported in the 9th volume, B. L. R., p. 441. The question is discussed by the Chief Justice in his judgment, p. 458, and he points out the course taken in that case which is very similar to the course taken by the Moonsiff in this case, and is one which is warranted by the decision of the Privy Council there referred to. It seems, therefore, that the Moonsiff was warranted in trying this suit upon the original cause

of action, and in that view he had jurisdiction.—*C. H. C.*, 25th April 1873, *F. M. Proby*, XX., *W. R.*, p. 6.

The mode of valuation for the purpose of jurisdiction of a Court is quite different from that for paying the Court Fees under Act VII. of 1870.

The market-value of a property was, it may be said, Rs. 2,000, but it was valued in a suit as worth Rs. 200 calculating the same in accordance with the provisions of the Court Fees' Act. *Held* in conformity with decisions reported in 16, *W. R.*, p 10, Full Bench Rulings and in 18, *W. R.*, p 109, Civil Rulings, that the valuation which is to govern the jurisdiction of the Court is a perfectly distinct matter from the valuation according to which stamps and fees are to be levied, and that the special rules of the Court Fees' Act were not intended for determining value of a property for ascertaining jurisdiction, and that the Courts must in each case estimate the amount or value of the subject matter in dispute for the purposes of jurisdiction by the aid of the best evidence available bearing upon the actual amount or value of that subject.—*C. H. C.*, (*Phear and Analia*), the 6th May 1873, *Namboorsingh*, II., *Law Observer*, p. 136.

Legal necessity for sale by Hindoo Widow.

Gya Sradh is a legal necessity for which a Hindoo Widow can

alienate a portion of her estate. But it should be enquired and decided whether her husband left any property from the income of which the pilgrimage in question might have been performed without selling the landed estate.

All purchasers from a Hindoo Widow know or ought to know by this time the extreme risk of such a transaction, and if they choose to run it, and to buy, without consulting the next heirs or without taking some further steps as would enable them at some future time should necessity arise, to prove that they made diligent and careful enquiry as to the existence of a legal necessity before buying, they must take the consequences.—*C. H. C.*, *Kemp and Glover*, J. J. —The 19th April 1873, *Mahomed Ashruf*, II., *L. O.*, p. 131.

Bengal Civil Courts Act (VI. of 1871) Sec. 22 meaning of the words "subject matter"—Appeal from an order of the Subordinate Judge.

The appeal from an order of a Subordinate Judge directing execution to issue lies to the District Judge, and not to the High Court, where the amount claimed in a suit is under Rs. 5,000, although the amount sought to be recovered in execution has, by the addition of interest since decree, grown to a sum exceeding Rs. 5,000.—In Section 22 of Act VI. of 1871, the words "subject matter in dispute" is the subject matter for which the plaint is brought.—(Vide 9, *B. L. R.*, 195;

Duli Chand.)—7th February 1873, *C. H. C., Mussammat Rattanjote Koer, B. L. R., Vol. X., p 290.*

Tenant's rights to lands resumed.—Auction-purchaser.—Relation of Landlord and Tenant.

Case.—M and his brothers held a tenure of 10 beegahs as lakheraj. The zemindar sued for resumption of this land obtained a decree for 3 beegahs. After this M and his brothers sold the whole tenure as lakheraj to plaintiff and took a lease from him for five years as ryots. Subsequently the zemindar took out execution of the decree he had obtained for costs, and sold M and his brothers' rights and interest in the 3 beegahs, in the land which had been declared mal. These rights were bought by R and P. After this plaintiff sued M and his heirs for rents. Defendants objected that 3 beegahs had been taken out of their possession by R and S, who, on being made defendant, denied plaintiff's right to rent which they had paid to the zemindar: Held that the utmost right that M and his brothers had in the resumed land was the right to settlement; that this was a personal right which could not have been transferred to a third party except with the consent of the zemindar; that as no relation of landlord and tenant exists between plaintiff and the execution-purchasers, they ought not to have been made defendants; that the execution-purchasers held the land as purchasers

of M's right to a settlement with the zemindar at a sale held with the zemindar's consent, and the only person to whom they have attorned as tenants is the zemindar; and that they cannot in this suit be made liable to pay rent to the plaintiff.—*C. H. C. (Couch, C. J. and Glover, J.), 26th April 1873, Mohesh Chunder Bhattacharjee, XX., W. R., p. 7.*

Reversioner setting aside an alienation made by a Hindoo Widow.—Limitation.

A party desirous, as a reversioner, to obtain a declaration of his rights affected by a sale or gift made by a Hindoo widow must bring his suit within twelve years of the alienation. After the death of the widow, the remedy open to him is of a different description.—*C. H. C. (Jackson and Mitter, J. J.) 24th April 1873. Bishonath Surma, XX., W. R., p. 1.*

Liability of bidders in auction-sales.—Section 254 of Act VIII. of 1859.

The ordinary course is for the bidder, to whose bid the property was knocked down, immediately to announce the person *on whose behalf* the bid was made by him, if he does not expressly say that the bid was made for some person other than himself, it must be taken as against him that he did, in fact, bid on behalf of himself.

If for any good reason the auctioneer does not accept as purchaser, the person named by the highest bidder as his principal, he cannot make the bidder himself purchaser

against his will. He must simply declare that no sale has been effected and re-open the bidding. It would be good reason for not accepting the named principal, that the bidder did not, when called upon to produce a sufficient authority of agency from him.

Process of execution cannot in any case rightly issue against the defaulting purchaser for the difference of price, which is leviable from him under the terms of Section 254, until an order for payment of that difference has been made upon him, and no such order can rightly be made upon him without affording him an opportunity of showing cause against it. For until such an order for payment is made, there is nothing which can be executed, and it is only common justice that a man should be heard or have an opportunity of being heard before an order for payment of money should be made against him.—C. H. C. —Phear, J. (*Ainslie J. dissente.*) The 19th May 1873, Baboo Hurryram and Sreeram, II., L. O., p. 139.

Postponement of execution-sales under Act VIII., B. C., of 1869.—Security requisité.

COUCH, C. J.—The jurisdiction of the Moonsiff is given by Section 246 of Act VIII. of 1859 which authorizes the Court, when a claim is preferred to attached property, to investigate it with the like powers as if the claimant had been originally made a defendant to the suit. Section 247 enables the Court, if it

appears necessary, to postpone the sale for the purpose of making the investigation. In cases under Act VIII. of 1869, B. C., the power is subject to a further qualification; the Court is not to postpone the sale unless the amount of the decree is deposited or security given for it.—C. H. C., 1st May 1873, J. G. Bagram, XX., W. R., p. 10.

Municipal Commissioners—Their power to administer oath—Their actions to be controlled if made without jurisdiction—Act III. B. C. of 1864.

MARKBY, J.—By section 6 (Act III. B. C. of 1864) every Commissioner for the purposes of this Act is vested with the powers of a Magistrate under Section 28 of the Code of Criminal Procedure, and this would seem to be sufficient to authorize him to administer on oath, if the purposes of the Act require that he should do so.

Regular reports signed by medical men constitute the evidence of competent persons within the meaning of Act III. B. C. of 1864.

It should, of course, be presumed that a public body of this kind (The Municipal Commissioners) acting on behalf of the public are acting *bond-fide*; and their whole conduct must be looked on in order to see whether they have substantially complied with the powers conferred upon them by the Legislature. But it is obviously necessary that there should be some control over persons exercising such very

EXTRA PAPERS.

Benamée Transactions—Their Legal Effects.

BENAMÉE transactions are a custom of the country and must be recognised till otherwise ordered by law.* If gentlemen holding property benamée keep fictitious books, and make false statements in petitions to Courts of Justice and in their private correspondence, for the purpose of concealing property from their creditors or for deceiving the members of their own family, they have only themselves to blame, and they should not be surprised if they are not believed when, for their own benefit, they offer themselves as witnesses in a Court of Justice, and openly and without shame avow that all that has been said or done was false and fictitious for the purpose of carrying into effect their own infamous designs(†) The compatibility of benamée transactions with honesty depends upon the peculiar circumstances of each case.‡

In questions of *benamée* ownership, the criterion is, to consider from what source the purchase-money comes; the presumption is that purchase made with the money of A in the name of B is for the benefit of A || The burden of proof lies on the person who

maintains that the apparent state of things is not the real state of things, and the apparent purchaser must be regarded as the real purchaser until the contrary be proved.*

LEADING CASES.

Case (1.)—A person having purchased an estate by private sale sued to set aside a *mokurruree* created by his vendor. The deed of sale recited that the *mokurruree* was a mere benamée created in fraud of creditors, and that the vendee might set it aside. The defendant pleaded a *bond fide* holding and alleged that the plaintiff's vendor had publicly admitted the reality of the transaction in a suit in a Court of Justice and that it was found to be so. The Calcutta High Court following the decision of the late Sudder Court, in the case of *Trilochun, v. Obhoy Churn*, at p. 1639 of S. D. Reports of 1859, which is a leading case on the subject, decided that the plaintiff could not succeed, observing that, "a party cannot plead his own fraud and the party who makes that allegation must fail. If the plaintiff alleges that the deed is *bond fide*, and the defendant pleads that it is a fraud to which he was a party, the plea cannot be heard, and the plaintiff must have a decree. If the plaintiff alleges that he and the defendant were equally

(*) 7, W. R., p. 138.

(†) 11, W. R., p. 72.

‡ 7, W. R., p. 138.

|| 13, W. R., (Privy Council) p. 1.

* 3, Agra Rep., A. C., 16.

parties to the fraud, he cannot be heard, his suit must at once be dismissed. It is sufficiently established that the heirs of the fraudulent parties representing them are equally bound with the original parties. The only distinction sought to be drawn in this case is that the present plaintiff is not an heir but a private purchaser. No distinction can be drawn. All representatives are equally bound. The exception is only when a plaintiff is himself a defrauded party, and comes into Court for relief from a fraud against himself perpetrated by his vendor in collusion with the other party. This would be the case of a purchaser at a compulsory execution sale; because the fraudulent transfer would be, in fact, a fraud committed both against the creditor and against the execution purchaser. It may also be that if plaintiff's vendor had defrauded him by concealing this tenure altogether, and inducing him to give valuable consideration in ignorance of it, he might, on proving such a case, have a good action against both the parties who created the fraudulent tenure. But in this case he cannot say this—on the face of his deed of sale, he was made aware of the transaction. The plaintiff stands simply in the shoes of the vendor, and both the vendor and his present representative are equally incompetent to come into Court, alleging the vendor's fraud. If it were otherwise,

a fraudulent party himself precluded from bringing a suit, might cure all defects by simply setting up a purchaser under himself; while he would obtain through a purchaser the value of a good title.”*

*Case (2).—*In a suit by an heir to recover property which had been transferred by a benamee and fictitious conveyance on the part of plaintiff's father, where the object was found to have been to defraud creditors, the Calcutta High Court followed the decision of the Sudder Dewanny Adawlut at p. 1639, S. D. A. Reports of 1859, which held that “when parties execute fictitious deeds for the purpose of defeating creditors, they place themselves at the mercy of the person in whose name the fictitious conveyance is made, and their subsequent plea of the transaction being benamee should not be listened to;” with reference to the question of *pari delicto* that judgment stated, that, “the objection must come from a person who is neither party nor privy to it, for no man can allege his own fraud in order to invalidate his own deed.”†

*Case (3).—*Plaintiffs, as legal heirs, the son and daughter of Shaik Kaloo, sought to obtain possession of their share of his property from Rowshun Beebee, the widow of the said Kaloo, who was in possession under a deed of

* III., W. R., p. 92.

† XIII., W. R., p. 87.

gift alleged to be executed by Kaloo in her favor in lieu of dower. The transaction was found not to be a *bond fide* one. The Calcutta High Court held "that the plaintiffs who are representatives of the party who executed the deed, are bound by his act. The deed must hold good against them, though it would be no bar to any creditor seeking to recover his dues from the property now in the defendant's possession."*

"If he who is indebted to five several persons, to each party in 20*l.*, in consideration of natural affection gives all his goods to his son, or cousin, in that case, for as much as others should lose their debts, &c., which are things of value, the intent of the act was, that the consideration in such cases should be valuable; for equity requires that such gift, which defeats others, should be made on as high and good consideration as the things which are thereby defeated are; and it is to be presumed that the father, if he had not been indebted to others, would not have dispossessed himself of all his goods, and subjected himself to his cradle; and therefore it shall be intended, that it was made to defeat his creditors."—*Smith's Leading Cases*, Vol. I., page 3.

*Case (4).—*Three brothers,—A, B and C transferred their properties to their wives in fraud of creditors. D, a nephew of theirs, fully aware that these deeds were merely nominal, and that no possession had passed under them, in order to perpetrate a fraud on other heirs to his uncles' estate who were minors, fraudu-

lently induced the said wives of his uncles', after the death of their husbands, to make over their nominal rights to him. In a suit brought by one of the said heirs, it was contended that even if the deeds alluded to were executed in fraud of creditors, they were good between the parties, and that the subsequent transfers to D were therefore good also, and that neither the parties who made the fraudulent transfers, nor their heirs, could in any way question such deeds. The Calcutta High Court considering these arguments to be of no avail, remarked "They might be good arguments in support of his rights, if he was a purchaser for valuable consideration without notice of the nominal nature of the original transfers. But, so far from this being the case, he is a nephew of the parties who executed these deeds; he had full notice of the true nature of those documents; he was fully aware that they were mere *paper* transactions, under which no possession had passed, and to which no effect had been given. He cannot, therefore, be allowed to benefit by such deeds."*

*Case (5).—*A person conveyed the disputed property to another *benamtee* upon the occasion of the failure of a firm in which he was an assistant, under the vague ap-

prehension that he would be made liable for the debts of his employers. Upon a suit by the heirs of the real owner against the representatives of the *benameedar* for recovery of the said property it was urged that the plaintiffs having admitted a nominal conveyance, their suit was untenable, the Calcutta High Court held that the plaintiffs were entitled to recover as the conveyance did not amount to a fraud.*

If parties stand by and permit another to hold himself out to the world as the real proprietor of an estate when he in reality is a *benameedar* for them, and thus induce parties innocent of the fraud to lend their money upon such faith, they are not entitled to any consideration from a Court of equity and good conscience.

Case.—The plaintiff, the real owner, permitted his *benameedar* to deal with the property as his own by pledging it to the defendant for sums borrowed from him. Further, it appeared that, after disputes had broken out between the plaintiff and his *benameedar*, the former permitted the latter to lease out the property to another person, treating it as his own. Then, when the defendant sued to recover the monies due on his bond, the plaintiff permitted a decree to pass unquestioned, where by the property was rendered liable.

Under these circumstances the Calcutta High Court held that the plaintiff was not entitled to any consideration from a Court of Equity*.

A purchase for valuable consideration and without notice of the benamee, from one who, in the eyes of the world, is the absolute owner of a property, and who holds that property, to all appearances, under a good and sufficient title, would be protected and would hold good against any subsequent sale made by the real owner or his heir.†

If property is purchased in the name of a *benameedar*, and all the indicia of ownership are placed in his hands, the true owner can only get rid of the effect of an alienation by the *benameedar*, by showing that it was made without his own acquiescence, and that the purchaser took with notice of that fact.‡ A decree of foreclosure obtained against the *benameedar* is binding upon the execution-purchasers of the rights and interests of the actual owner who had originally purchased and mortgaged in the name of the *benameedar*, unless it can be shown that the foreclosure was effected in fraud of them.

Case.—The plaintiff alleged that the property in dispute originally belonged to Gunga Persaud; that it was bought by Gunga Persaud

* V., W. R., p. 37.

† III., W. R., p. 10.

‡ X., W. R., p. 185.

in the name of Gour Surn Persaud ; that on the 26th of July 1851, Gunga Persaud, through his *benamedar* Gour Surn, mortgaged the property by conditional sale to Bhugwan Lall ; that on the 29th of December 1854, Bhugwan Lall foreclosed, and, dying shortly after, his widows (defendants Nos. 3 and 4), obtained possession ; and that finally on the 7th of July 1863, the plaintiff himself purchased the same property at an execution-sale effected in consequence of a decree passed against the widows. The defendants (Nos. 1 and 2) resisted the claim of the plaintiff, on the ground that Gour Surn Persaud's conditional sale on the 26th of July 1851 did not pass the property of Gunga Persaud, and that they, on the 1st of December 1851, bought the rights and interests in the same property at an auction-sale in execution of a decree against Gunga Persaud. The facts were found as alleged by the plaintiff. The Calcutta High Court observed " that the Principal Sudder Ameen has, in terms, found that Gunga Persaud bought the property in the name of Gour Surn Persaud, and that it was on that account that the conditional sale of 26th July 1851 was made in the name of Gour Surn Persaud. If this be so, then the decree of foreclosure of 29th December 1854 obtained, no doubt, as far as concerns name, against Gour Surn Persaud alone, would be good and binding against

the defendants Nos. 1 and 2, so as to foreclose the equity of redemption which they purchased of Gunga Persaud, unless they can show that the foreclosure was effected in fraud of them or of their vendor and consequently was void and inoperative..... If notice which must have preceded the foreclosure decree of December 1854 was served upon the right person, then the decree will bind the equity of redemption, into whosoever hand it may have passed. It might no doubt, (supposing the fact were so) have been possible to show, that the notice of foreclosure was served upon Gour Surn Persaud, and kept from the knowledge of them, the defendants, although the mortgagee was well aware that the equity of redemption had passed from Gunga Persaud, or Gour Surn Persaud, into the hands of the defendants at the execution-sale : but until this is shown as a matter of fact, it must be presumed that the proceedings in the foreclosure were regular and valid, and as far as can be gathered from the record, Gour Persaud was the right person against whom the suit should have been brought."*

Where property is held *benames*, and the ostensible owner assents to its being disposed of by a third party to the prejudice of the real owner, the real owner cannot be allowed to object.

* X., W. R., p. 185.

Case.—The plaintiff held property *benamee* in the name of Greesh. Greesh stood by while Mothoor mortgaged the whole property, and Greesh subscribed his name to the mortgage, thereby admitting that Mothoor was capable, as owner, of dealing with the whole property. The Calcutta High Court said that “the plaintiff is undoubtedly bound by his *benameedaree* acts. If he will put forward another person as the owner of his property, that person is to the rest of the world the real owner; and if the ostensible owner deals with the property, the plaintiff cannot be allowed to object. His own acts have led to the fraud.”*

An innocent holder (for value and exercising ordinary diligence) of property given in pledge for the payment of a debt, without notice of his debtor being a *benamee* holder for others, is entitled to maintain his lien.

Case.—Plaintiff claimed to sell in execution of a decree certain property, of which his debtor was the registered and ostensible proprietor. Defendants, alleging that they were the real owners holding *benamee*, succeeded in getting the property released by summary award. In a regular suit coming on appeal, the Calcutta High Court decided that “the registered bond, which is the foundation of plaintiff’s claims, pledges the disputed

property for the payment of the debt; and that plaintiff being an innocent holder for value exercising ordinary diligence, who accepted the lien without notice, is entitled to maintain his lien and all the property in satisfaction of the debt; and on that ground should succeed as against the parties who, by their acts, enabled the *benameedar* to deceive him and take his money.”*

Where a conveyance is made *benamee*, the donor remaining the absolute and uncontrolled owner of the property from the date of gift to his death, the property passes at his death not to the donee but to his own heirs.

Case.—A had two sons B and C. B during the life-time of A, was involved in considerable debts. A executed a deed of gift to his wife and sister-in-law 15 or 16 years before his death, providing in that deed that on their death the estate was to go to B’s son, if he should have any, and to C. and his sons absolutely. Since the date of gift the names of the above ladies had been used in all paper transactions, but A had remained until the day of his death in the actual enjoyment of the property, and since his death B had been in possession of his share. At the death of A, the creditors of B having attached his share in the property, objections were raised on the ground that he had no interest. The creditors hav-

* IX., W. R., p. 598.

* IV., W. R., p. 36.

ing been unsuccessful brought a regular suit to have it declared that a share of A's estate came by inheritance to B. The suit coming on appeal before the Calcutta High Court, they observed "The motive of such a transaction is perfectly clear. By this transaction, if successful, while on the one hand Sreenath's (B's) creditors would be excluded, on the other hand Sreenath himself would not. The deed could be used to keep off claimants outside the family, whilst within the family matters would go on as before. The very essence of such a transaction is that it should have a double aspect, and there is no doubt the experience and skill which persons in this country have gained by a constant resort to such transactions make it exceedingly difficult for a Court of Justice to detect the truth. But upon the whole, we have come to a clear conclusion * * * that the conveyance by Ajoodhya Ram (A) to his wife and sister-in-law was benamee; that Ajoodhya Ram (A), notwithstanding that nominal conveyance, remained the absolute and uncontrolled owner of the property; and that a share in this property passed at his death by inheritance to Sreenath (B)."

Strict proof is necessary to establish *benamee ownership* in a property which is attached or sought to be sold by creditors in satisfaction

of decree against the person in whose name the property stands.

Case.—A certain Nawab purchased with his own funds property in the name of his son. Creditors of the son attached that property, but the Nawab having laid his claim to it, his claim was disallowed and he was referred to a regular suit. On a regular suit being brought by the Nawab, it was found, that the motive of the Nawab in purchasing the property in the name of his son was to vary the rule of succession between sons and daughters in his family. The Privy Council in dismissing the Nawab's appeal observed "If the conveyance to the sons was designed to produce an effect thereafter, by changing the amount of shares of the whole property on a succession between sons and daughters, it could not be designed as a mere naked benamee conveyance, because, * * a mere benamee conveyance would in no way affect such succession. But if, as the Nawab himself represented the transaction, it was designed to affect the daughter's claims or interests, it could only so operate as a real transaction; that is, by a conveyance of interest to the sons. It is immaterial in this case to consider whether the legal effect of the arrangement would be to confer a resulting life-estate on the Nawab or not, since the only contest made in the suit was whether it was an absolute benamee transaction. The

case admitted, certainly, of being viewed thus, that the conveyance, was mere colorable, to be treated as real should it become necessary to defeat a daughter's claim, but fictitious as between father and sons. It is to be observed however, that this view of the case was not presented to the Judge; and if it had been so presented, the Judge would have been justified in declining to act on such an allegation of fraud against creditors of the son * * * in favor of the father, alleging his own fraud. Their Lordships, therefore, think that the Principal Sudder Ameen was justified in regarding the whole evidence before him as not sufficient to establish the case of benamée ownership, which the Nawab advanced. As the decision under review does not appear to conflict with any rule of law, as the question decided is one of fact, as the decision is sustained by sufficient evidence, and establishes the claim of creditors against property of which their debtor was allowed for many years to have, at least, the ostensible ownership, it is one which their Lordships would not disturb, unless it were clearly shown to be wrong. It is the duty of a Court of Justice in such a case to put the objector to the rights of creditors founded on apparent ownership to strict proof of his objection; he must recover, if at all, on the case that he asserts. It would be easy, if such vigilance and jealousy were

not exhibited, for a family to place the family property out of reach of creditors. If the father became indebted, the titular right^s would be then stated to have conveyed the real interest; but if the son were indebted, then the claim would take the form to which this suit is adapted. Views of these dangers to the rights of creditors seem to have been present to the Courts below; and in the present case their Lordships are unable to see that jealousy of a probable fraud has induced an incorrect estimate of the evidence."*

If a person purchases property *benamée* at an execution-sale, and remains in possession and if afterwards the *benameedar* as certified purchaser sues the real owner to recover possession, it was held by the Privy Council that section 260 of the Civil Procedure Code is no bar to preclude the enquiry into the real title.

Case.—Brijlall Opadhia was mortgagee in possession of Talook Doodhur. Whilst he was so in possession, the interest of the mortgagor was offered for sale under a decree obtained against him by a creditor. Buhoree Lall became the ostensible purchaser at such sale, and the certificate of sale was granted to him in his own name as the purchaser. Brijlall Opadhia remained in possession until his death

(To be continued.)

Sections one, eight, nine, ten and twelve of Madras Act No. I. of 1868 (*for the appointment of a Commissioner for the administration of civil and criminal justice and for the superintendence and collection of the revenues on the Neilgherry Hills*) shall be read as if, for the words 'Civil' and 'Zillah', used therein with reference to a Civil or Zillah Judge or Court, the word 'District' was substituted, and as

Amendment
of Madras Act
I. of 1868.

if, for the words "Principal Sudder Ameen," the words 'Subordinate Judge' were substituted.

But save as provided in this section nothing herein contained shall be deemed to affect the said Madras Act.

30. The High Court may permit the Civil Courts under its control to adjourn from time to time for periods not exceeding in the aggregate two months in each year.

Vacation.

SCHEDULE

[Referred to in section 2.]

I.—MADRAS REGULATIONS.

Number and year of Regulation.	Title of Regulation.	Extent of repeal.
Regulation II. of 1802 . . .	A Regulation for establishing and defining the Jurisdiction of the Courts of Adawlut, or Courts of Judicature, for the Trial of Civil Suits in the first instance, in the British Territories immediately subject to the Presidency of Fort St. George.	So much as has not been repealed.
Regulation III. of 1802 . . .	A Regulation for receiving, trying and deciding suits or complaints declared cognisable in the Courts of Adawlut established in the several zillahs immediately subject to the Presidency of Fort St. George.	The unrepealed part of section seven. The unrepealed part of the first clause of section sixteen.

SCHEDULE,—*continued.*I.—MADRAS REGULATIONS,—*continued.*

Number and year of Regulation.	Title of Regulation.	Extent of repeal.
Regulation XII. of 1802...	A Regulation for the appointment of the Ministerial Officers of the Civil and Criminal Courts of Judicature.	So much as has not been repealed.
Regulation III. of 1816 ...	A Regulation for rescinding Regulation VI. of 1806, and for authorizing the Courts of Sudder and Foudarry Adawlut to sanction the occasional Adjournment of the Civil and Criminal Courts under the Presidency of Fort St. Goerge.	So much as has not been repealed.
Regulation VI. of 1816	. Regulation for reducing into one Regulation, the Rules which have been passed regarding the Office of Native Commissioners; for modifying and extending their Powers in the Trial and Decision of Civil Suits; and for authorizing them, under the designation of District Moonsifs, to discharge certain additional Duties.	So much as has not been repealed.
Regulation VII. of 1816.	A Regulation for authorizing District Moonsifs to assemble District Punchayets for the Adjudication of Civil Suits for Real and Personal Property, without limitation as to Amount or Value, within their respective jurisdictions; and for defining the Powers and Authority to be vested in such District Punchayets.	The whole.
Regulation II. of 1821...	A Regulation for extending the Jurisdiction of the Registers, Sudder Ameens, and District Moonsifs, and for the more effectual checking of Abuses by District Moonsifs.	So much as has not been repealed.

SCHEDULE, — *continued.*I.—MADRAS REGULATIONS,—*concluded.*

Number and year of Regulation.	Title of Regulation.	Extent of repeal.
Regulation VII. of 1827.	A Regulation for constituting the Office of Native Judge.	The whole.
Regulation II. of 1828 ...	A Regulation for improving the Administration of Justice by District Moonsifs, in certain respects.	So much as has not been repealed.
Regulation I. of 1829.	A Regulation for amending the Rules in force relative to the Trial of Appeals, and for the better securing of Impartiality in the Administration of Justice.	So much as has not been repealed.
Regulation III. of 1833...	A Regulation for conferring upon Sudder Ameens jurisdiction in Criminal Cases, and for extending the Civil Jurisdiction of Registers, Sudder Ameens, and District Moonsifs.	So much as has not been repealed.

II.—Acts.

Number and year of Act.	Title of Act.	Extent of repeal.
Act No. VII. of 1843 .	An Act for abolishing the Provincial Courts of Appeal and Circuit in the Presidency of Fort St. George, and for establishing new Zillah Courts to perform their functions; for establishing Courts constituted according to Regulations I. and II. and Regulations VII. and VIII. of 1827, in place of the existing Civil and Criminal Zillah Courts, and for extending the Civil jurisdiction of such Courts.	The whole Act, except sections twenty-six, forty-four and forty-seven.

SCHEDULE,—*concluded.*II.—Acts,—*concluded.*

Number and year of Act.	Title of Act.	Extent of repeal.
Act No. IX. of 1844 ..	An Act for authorizing the institution of Suits in the Courts of Principal Sudder Ameens and Sudder Ameens.	So much as has not been repealed.
Madras Act No. IV. of 1863.	An Act for investing certain Courts in the Presidency of Fort St. George, either wholly or in part, with the jurisdiction exercised by Courts of Small Causes established under Act XLII. of 1860.	The whole.
Madras Act No. I. of 1865.	An Act to provide for the alteration of the stations of Zillah Courts and limits of Districts or Zillahs in the Madras Presidency.	The whole Act, except so much of section one as empowers the Governor in Council of Fort St. George to alter the limits of existing districts.

**THE PANJAB MUNICIPAL
ACT, 1873.**

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ACT No. IV. OF 1873.

PASSED BY THE GOVERNOR GENERAL
OF INDIA IN COUNCIL.

(Received the assent of the Governor General on the 21st January 1873).

An Act to provide for the appointment of Municipal Committees in the Panjáb, and for other purposes.

WHEREAS it is expedient to provide for the appointment of Municipal Committees in towns in the Panjáb, and for police, conservancy, local improvements, and education in such towns, and for the levying of rates and taxes therein ; It is hereby enacted as follows :—

I.—Preliminary.

1. This Act may be called "The Panjáb Municipal Act, 1873 :"
- It extends only to the territories under the Government of the Lieutenant Governor of the Panjáb ;
- And it shall come into force on the passing thereof.

2. Act No. XV. of 1867 *(to make better provision for the appointment of Municipal Committees in the Panjáb, and for other purposes)* and Act No. II. of 1872 *(to revive and continue the operation of Act XV. of 1867)* are repealed ; and Act No. XXVI. of

Commence-
ment.

Repeal of
Acts.

185) (to enable improvements to be made in towns) is repealed so far as it affects the Panjáb.

But all extensions and appointments made, and all limits defined, under the said Act No. XV. of 1867 shall be deemed to be, respectively, made and defined under this Act. And an extension of any particular provision of Act No. XV. of 1867 shall be deemed to be an extension of the corresponding provision of this Act.

And all assessments, bye-laws, rules and regulations of any kind, relating to matters provided for by this Act, which may heretofore have been made or approved by the Local Government, shall be deemed to have been made under this Act.

And all proceedings taken under any such assessments, bye-laws, rules and regulations shall be deemed to be as valid as if they had been taken under this Act.

3. In this Act "Committee" means a Municipal Committee defined under this Act.

4. The Local Government may, by notification published in the *Panjáb Gazette*, declare its intention to extend this Act, or any of its provisions, to any town in the said territories,

Any inhabitant of such town objecting to such extension may, within six weeks from the said publication, send his objection in writing to the Secretary to the Local Government, and the Local Government shall take such objection into consideration.

When six weeks from the said publication have expired, the Local Government, if no such objections have been sent as aforesaid, or (where such objections have been so sent in) if, in its opinion, they are insufficient, may, by like notification, effect the proposed extension.

5. For the purposes of this Act, the Local Government may, from time to time, by notification in the *Panjáb Gazette*, declare what shall be deemed to be a town for the purposes of this Act, and define the limits of any town to which this Act has been extended.

II.—Appointment, Duties and Powers of Committees.

6. In every town to which this Act is extended, the Local Government shall appoint, or cause to be appointed, a Committee consisting of not less than five members.

Such members may be appointed as the Local Government from time to time directs, either *ex officio*, or

by nomination, or by election, or some by one and some by any other of such methods:

Provided that (except with the approval of the Governor General in Council) not less than two-fifths of the members of a Committee shall be persons other than salaried officers of Government.

The Local Government may—

(a) from time to time remove any of the members of any Committee, add to their number, and fill up vacancies occurring among them;

(b) determine the time and manner of the election of those members whom it may direct to be appointed by election, and the persons by whom they shall be elected, and generally make such rules as it thinks fit for regulating such election;

(c) appoint the President and Vice-President, or either of them, of any Committee, or authorise any Committee to appoint, by election from their number, such President, or Vice-President, or both.

No appointment under this section, other than the appointment by election of a Vice-President, shall be valid unless and until it is notified in the *Panjab Gazette*.

7. Subject to any general rules

or special orders which the Governor General in Council may from time to time make in this behalf,

every Committee intending to

impose taxes for the purposes of this Act shall, from time to time, give public notice of such intention, and shall in such notice define the persons or property within the town to be taxed for the purposes of this Act, and the amount or rate of the taxes to be imposed hereunder.

Any inhabitant of such town objecting to such notice may, within a fortnight from the date of the said notice, send his objection in writing to the President of the Committee, and the Committee shall take such objection into consideration and report their opinion thereon to the Local Government.

When a fortnight from the date of the said notice has expired, if no such objections have been sent as aforesaid, or (where such objections have been sent in) if, in the opinion of the Committee, they are insufficient, the Committee may, with the previous sanction of the Local Government, to be notified in the *Panjab Gazette*, define the persons or property and the amount or rate of the taxes aforesaid, and may then impose such taxes accordingly.

8. The Local Government may from time to time make rules—

as to the persons by whom, and the manner in which, any assessment

of taxes under this Act shall be confirmed,

and for the collection of such taxes;

and for the safety and due application of them when collected;

and for the rendering and publishing of such estimates and accounts relating to the expenditure of the Municipal Funds, in such form as it may think fit.

No tax shall be collected under this Act, until the assessment thereof has been confirmed by the persons and in manner for the time being prescribed by such rules.

9. Rates and arrears of rates imposed under this Act may be recovered as if they were arrears of land revenue.

10. All sums received by the Committee of any town to which this Act extends, and all fines levied under this Act, shall constitute a fund, which shall be called the Municipal Fund of such town, and shall, together with all property which may become vested in such Committee, be under their control, and shall be applied by them as trustees for the purposes of this Act.

11. Every Committee, so far as the Municipal Fund at their disposal permits, shall, after providing out of such Fund for a police establishment in manner hereinafter mentioned,

keep the public streets, roads, drains, tanks and water-courses of the town for which they are appointed clean and repaired;

and, generally, may do all acts and things necessary for the construction, repair and maintenance of local public works of general utility;

and may also make provision, by the establishment of new schools or the aiding of already existing schools or otherwise, for the promotion of education;

and may also make provision for promoting the public health, safety, comfort and convenience.

12. Every Committee shall set apart out of the Municipal Funds such sum as the Local Government from time to time requires for the maintenance of the police establishment in the town for which the Committee is appointed.

13. Every Committee may make rules for regulating—

the time and place of their meeting;

the conduct of their business;

the division of duties among the members of the Committee;

the duties, salaries, appointment, suspension and removal of the officers and servants of the Committee;

and other similar matters.

14. Any Committee may make bye-laws—
Power to make bye-laws.

(a) for defining, prohibiting and abating nuisances which are not public or common nuisances under the Indian Penal Code, or under Act No V. of 1861 (*for the regulation of Police*) :

(b) for defining the cases, manner and times in and at which the officers of the Committee may enter upon private property for the detection and abatement of nuisances :

(c) for securing a proper registration of births and deaths ;

(d) and for carrying out all or any of the purposes of this Act.

The Committee may, from time to time, repeal, alter or add to any bye-laws made under this section.

15. No bye-law, and no alteration or repeal of or addition to a bye-law, shall have effect until it has been confirmed by the Local Government.
Bye-laws to be confirmed and published.

All bye-laws made under this Act, and all rules made under section thirteen, and all alterations and repeals of and additions to such bye-laws and rules shall, before coming into force, be published for such length of time, and in such manner, as the Local Government from time to time directs.

16. The officers of the Committee shall have power to enter upon private property for the detection and

abatement of nuisances when the Committee shall, under section fourteen, clause (b), have made bye-laws regulating the exercise of such power.

17. The Local Government may, by order, suspend or limit all or any of the powers of any Committee, and may also cancel any of their proceedings, rules or bye-laws, and remit or reduce any tax which they have imposed.
Power to suspend or limit powers of Committees.

III.—Suits by and against Committees.

18. Every Committee shall sue and be sued in the name of their President.
Suits by and against Committees.

Every contract made on behalf of any Committee in respect of any sum or property exceeding twenty rupees in amount or value, shall be in writing, and shall be signed by the President or Vice-President (if any) and at least two other members of the Committee.
Contracts of Committees.

No contract, unless so executed, shall be binding on the Committee on whose behalf it is made.

No member of a Committee shall be personally liable for any contract made or expense incurred by or on behalf of the Committee, but the

funds from time to time in the hands of the Committee shall be
Liability of members of Committees.

liable for, and chargeable with, contracts duly made as aforesaid.

Every member of a Committee shall be liable for any misapplication of money entrusted to the Committee, to which he has been a party, or which happens through, or is facilitated by, his neglect of his duty ;

and he shall be liable to be sued for the same in such Court as the Local Government directs as for money due to the Secretary of State for India in Council.

19. No suit shall be brought against a Committee or any of their

Bar of suit in absence of one month's notice of cause of suit.

officers, or any person acting under

their direction, for anything done, or purporting to be done, under this Act, until the expiration of one month next after notice in writing has been delivered or left at the office of the Committee, or at the place of abode of such person, stating the cause of suit and the name and place of abode of the intended plaintiff.

Unless such notice be proved, the Court shall find for the defendant.

Every such suit shall be commenced within three months next after the accrual of the right to sue and not afterwards.

And if any person to whom any such notice of suit is given shall, before suit brought, tender sufficient amends to the plaintiff, such plaintiff shall not recover.

IV.—Penalties.

20. No member or servant of a Committee shall be interested, directly or indirectly, in any contract made with the Committee, and if any such person be so interested, he shall

Penalty on member or servant of Committee being interested in contracts made with Committee.

thereby become incapable of continuing in office or in employment as such member or servant, and shall be liable to a fine of five hundred rupees :

Provided that no person, by being a shareholder in, or member of, any incorporated or registered Company, shall be disqualified from acting as a member or servant of a Committee by reason of any contract entered into between such Company and the Committee.

Nevertheless it shall not be lawful for such shareholder or member to act as a member of the Committee in any matter relating to any contract entered into between the Committee and such Company.

21. Whoever infringes any bye-law made and confirmed as directed in this Act, shall be liable to a fine not exceeding fifty rupees,

Penalty for infringement of bye-laws or non-payment of fines.

and, in the case of a continuing infringement, to a fine not exceeding five rupees for every day after notice from the Committee of such infringement.

In default of payment of any fine imposed under this section, the

defaulter shall be liable to simple imprisonment for a term not exceeding eight days.

22. Prosecutions under this Act for infringements of bye-laws may be instituted before any Magistrate by the Committee, or by any person authorized by the Committee in this behalf.

23. Fines imposed under this Act may be recovered in manner provided by the Code of Criminal Procedure.

THE GOVERNMENT SAVINGS BANKS ACT, 1873.

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ACT NO. V. OF 1873.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor General on the 28th January, 1873.)

An Act to amend the Law relating to Government Savings Banks.

WHEREAS it is expedient to amend the law relating to the payment of deposits in Government Savings Banks; It is hereby enacted as follows:—

Preliminary.

1. This Act may be called "The

Short title. Savings Banks Act, 1873."

Local extent. It extends to the whole of British India;

Commencement. And it shall come into force on the passing thereof.

2. Act No. XXVI. of 1855 (to Repeal of Act XXVI. of 1855. *facilitate the payment of small deposits in Government Savings Banks to the representatives of deceased depositors*) is hereby repealed.

Interpretation-clause. 3. In this Act-

"Depositor" means a person by whom, or on whose behalf, money has been heretofore, or shall be hereafter, deposited in a Government Savings Bank, and "deposit" means money so deposited:

"Secretary" includes every person empowered to manage a Government Savings Bank;

and "Minor"

"Minor." means a person who has not completed

the age of eighteen years.

Deposits belonging to the Estates of deceased Persons.

4. If a depositor dies, leaving in a Government Savings Bank a sum of money not exceeding one thousand rupees,

and if probate of his will or letters of administration of his estate, or a certificate granted under Act

No. XXVII. of 1860. (for facilitating the collection of debts on successions, and for the security of parties paying debts to the representatives of deceased persons), is not produced to the Secretary of such Bank within three months of the death of the said depositor,

the Secretary of such Bank may pay the said sum of money to any person appearing to him to be entitled to receive it, or to administer the estate of the deceased.

5. Such payment shall be a full discharge from all further liability in respect of the money so paid:

But nothing herein contained precludes any executor or administrator, or other representative of the deceased, from recovering from the person receiving the same the amount remaining in his hands after deducting the amount of all debts or other demands lawfully paid or discharged by him in due course of administration.

And any creditor or claimant against the estate of the deceased may recover his debt or claim out of the money paid under this Act, or the said Act No. XXVI. of 1855, to any person, and remaining in his hands unadministered, in the same manner, and to the same extent as if the latter had obtained letters of

Saving of right of creditor. And any creditor or claimant against the estate of the deceased may recover his debt or claim out of the money paid under this Act, or the said Act No. XXVI. of 1855, to any person, and remaining in his hands unadministered, in the same manner, and to the same extent as if the latter had obtained letters of

Saving of right of creditor. And any creditor or claimant against the estate of the deceased may recover his debt or claim out of the money paid under this Act, or the said Act No. XXVI. of 1855, to any person, and remaining in his hands unadministered, in the same manner, and to the same extent as if the latter had obtained letters of

administration of the estate of the deceased.

6. The Secretary of any such Bank may take such security for security as he thinks necessary from any person to whom he pays any money under section four for the due administration of the money so paid,

and he may assign the said security to any person interested in such administration.

7. For the purpose of ascertaining the right of the person claiming to be entitled as aforesaid, the Secretary of any such Bank may take evidence on oath or affirmation according to the law for the time being relating to oaths and affirmations.

Any person who, upon such oath or affirmation, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of an offence under section one hundred and ninety-three of the Indian Penal Code.

8. Where the amount of the deposit belonging to the estate of a deceased depositor does not exceed one thousand rupees, such amount shall be excluded in computing the fee chargeable under the Court Fees Act, 1870, on the probate, or letters

of administration, or certificate (if any), granted in respect of his property:

Provided that the person claiming such probate or letters or certificate shall exhibit to the Court authorised to grant the same a certificate of the amount of the deposit in any Government Savings Bank belonging to the estate of the deceased. Such certificate shall be signed by the Secretary of such Bank, and the Court shall receive it as evidence of the said amount.

9. Nothing hereinbefore contained applies to money belonging to the estate of any European officer, non-commissioned officer, or soldiers dying in Her Majesty's service in India, or of any European who, at the time of his death, was a deserter from the said service.

Deposits belonging to Minors.

10. Any deposit made by, or on behalf of, any minor, may be paid to him personally, if he made the deposit, or to his guardian for his use, if the deposit was made by any person other than the minor, together with the interest accrued thereon.

The receipt of any minor or guardian, for money paid to him under this section, shall be a sufficient discharge therefor.

11 All payments of deposits

Legalization
of like pay-
ments hereto-
fore made.

heretofore made to
minors or their guar-
dians by any Secre-
tary of a Govern-
ment Savings Bank shall be deem-
ed to have been made in accordance
with law.

Deposits belonging to Lunatics.

12. If any depositor becomes

Payment of
deposits belong-
ing to lunatics.

insane or otherwise
incapable of manag-
ing his affairs,

and if such insanity or incapa-
city is proved to the satisfaction of
the Secretary of the Bank in
which his deposit may be,

such Secretary may, from time
to time, make payments out of the
deposit to any proper person,

and the receipt of such person, for
money paid under this section, shall
be a sufficient discharge therefor.

Where a Committee or Manager
of the depositor's estate has been
duly appointed, nothing in this sec-
tion authorizes payments to any
person other than such Committee
or Manager.

Deposits made by Married Women.

13. Any deposit made by or on

Payment of
married wo-
men's deposits.

behalf of a married
woman, or by or on
behalf of a woman

who afterwards mar-
ries, may be paid to her, whether
or not the Indian Succession Act,
1865, section four, applies to her
marriage; and her receipt for money
paid to her under this section shall
be a sufficient discharge therefor,

Rules.

14. All certificates under section

Rules regu-
lating certifi-
cates under sec-
tion 8, and pay-
ments under
section 10, 12
or 13.

eight, and all pay-
ments, under section
ten, section twelve or
section thirteen, shall
be respectively grant-

ed and made by the
Secretary of the Bank, subject to
such rules consistent with this Act
as the Governor General in Council
may, from time to time, prescribe.

ACT NO. VI. OF 1873.

PASSED BY THE GOVERNOR GENERAL
OF INDIA IN COUNCIL.

(Received the assent of the Governor
General on the 28th January, 1873.)

*An Act to amend the Law relating
to the Transshipment of Goods
imported by Steamer, and for
other purposes.*

WHEREAS it is expedient to
amend the law re-
lating to the trans-
shipment of goods imported by
steamer; It is hereby enacted as
follows:—

1. This Act may be called "The
Transshipment
Short title. Goods Act, 1873":

It extends to the ports of Cal-
cutta, Madras, Bom-
Local extent. bay, Karachi, Aden,
Rangoon, Maulmain, Akyah, and
to such other British Indian ports
as the Governor General in Coun-
cil may from time to time, by noti-

fication in the *Gazette of India*, direct in this behalf;

And it shall come into force on the passing thereof.

2. Act No. XX. of 1867 (to authorize the transshipment without payment of duty of goods imported into Calcutta, Madras and Bombay by Steamers) is repealed. But all rules, rates and regulations prescribed under the said Act shall be deemed to have been prescribed under this Act.

3. Subject to the provisions hereinafter contained, the chief officer of customs of every port to which this Act extends for the time being may, on application of any person interested as owner, agent, consignee, or otherwise in any goods imported by steamer into such port, grant leave to tranship the same without payment of duty at the port of transshipment, and without any security or bond for the due arrival and entry of the goods at the port of destination:

Provided that such goods have been specially and distinctly manifested or declared at the time of import as for transshipment to some other British Indian or foreign port.

4. The power conferred by section three shall be exercised subject to such rules as the Local Government may from time to time prescribe by notification in the official Gazette.

5. A transshipment fee on each bale or package of any goods or class of goods transhipped under this Act, may be levied at such rates and under such regulations as the Local Government, with the previous sanction of the Governor General in Council, from time to time prescribes by notification in the official Gazette.

6. The Governor General in Council may from time to time, by order notified in the *Gazette of India*, prohibit the transshipment, at any specified port or at all ports, of any specified class of goods, or prescribe any special mode of transshipping any specified class of goods, and may, by like notification, cancel such order.

7. Opium imported by sea into any British Indian port may, if the Local Government think fit, but not otherwise, be re-exported by sea from the same port on payment of a duty equal in amount to the fee to which it would have been liable if it had been transhipped at such port.

Rules regulating exercise of power.

Levy of transshipment fee.

Power to permit transshipment without payment of duty.

Power to prohibit transshipment.

Duty on opium re-exported by sea.

Proviso.

8. This Act shall be read as part of the Consolidated Customs Act, and shall not be construed as in any respect limiting the power of the customs officers to levy duty or to require such bonds or other securities as are authorized by the same Act.

Act to be read as part of Act VI. of 1863.

ACT No. VII. OF 1873.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor General on the 11th February, 1873).

An Act for the levy of Port-dues in the Ports of British Burma.

WHEREAS it is expedient from time to time to bring ports in British Burma under the provisions of Act No. XXII. of 1855 (*for the regulation of Ports and Port-dues*) and to make regulations for the levy of dues in such ports without the necessity of passing a new Act for each occasion; It is hereby enacted as follows:—

1. This Act may be called "The Burma Port-dues Act, 1873":

Short title.

It extends only to the ports of British Burma which shall have been de-

Local extent.

clared subject to the said Act No. XXII. of 1855:

It shall be read with and taken as part of the same Act; •

To be read with Act XXII. of 1855.

And it shall come into force on the first day of March 1873.

Commence-ment.

2. In every case in which the Chief Commissioner of British Burma, with the previous sanction of the Governor General in Council, has declared or hereafter declares any port in British Burma to be subject to the said Act, he may, with the like sanction, by the same or any subsequent declaration, and notwithstanding anything contained in section forty-one of the said Act, further declare—

Power to declare maximum amount of port-dues leviable in Burma.

(a) the maximum amount of dues to be levied in such port,

(b) the conditions and modifications under which such dues shall be levied,

and may also from time to time, with the like sanction, vary such maximum amount, conditions and modifications.

3. Provided that the dues so authorized shall be charged only on sea-going vessels of the burden of ten tons and upwards, and shall not exceed the rate of four annas for every ton of burden.

What vessels chargeable. Limitation of rate.

PLEADERS &c.—RULES.

Rules drawn up in accordance with Section 4, Act XX. of 1865, for the qualification, admission, and enrolment of Pleaders and Mookhtears in Mofussil Courts.

1. Pleaders in the Mofussil Courts of the Regulation provinces, within the limits of the jurisdiction of the High Court, shall, as regards qualification, be of two grades.

2. Those of the higher grade shall be competent to appear, plead, and act in any Civil or Criminal Court subordinate to and within the limits of the general jurisdiction of the High Court, and also before the Board of Revenue or in any Revenue Court or Office within the said limits: Provided that they shall not appear, plead, or act in the High Court.

3. Those of the lower grade shall be competent to appear, plead, and act in the Courts of Moonsiffs, and in Small Cause Courts, and in the Courts of Officers in the district of Cachar, and the Divisions of Assam, Chota Nagpore, and Cooch Behar, exercising the powers of Moonsiffs under the Bengal Civil Courts' Act, 1871.

4. Mookhtears duly admitted and enrolled, may, subject to the conditions of their certificates as to the class of Courts in which they are authorized to practise, appear and act in any Civil Court, and may appear, plead, and act in any

Criminal Court within the same limits: Provided that they shall not appear, plead, or act in the High Court.

5. The Examiners hereinafter mentioned shall be the persons appointed to be Examiners by the Lieutenant Governor of Bengal under the provisions of Act XX. of 1865.

Qualifications for Pleaders of the Higher Grade.

6. Every person may be admitted as a pleader of the higher grade who shall be qualified as hereinafter prescribed, that is to say—

1st.—If he shall have obtained the Degree of Bachelor of Law of one of the Universities of Calcutta, Madras or Bombay, or shall be Licentiate in Law of one of the said Universities: Provided that his application for admission as a pleader be made within one year from the time of his obtaining such degree or license, or within such further time as the High Court shall for any special reason allow; or

2nd.—If he produce a certificate from the Examiners that he has passed, in the first class, an examination in the subjects prescribed from time to time by the High Court for such examination.

Such subjects shall until further orders by the Court, be as follows:—

HIGHER GRADE.

Subjects.

1st.—The law of property current in Bengal—

A.—With reference to the permanent settlement; to the Government lien on land; to claims to hold land exempt from the payment of revenue; and to the mode in which estates can be brought to sale for arrears of revenue.

B.—The law of under-tenures, and the mode in which the same can be brought to sale for arrears of rent.

C.—The relation of landlord and tenant.

D.—Mortgages, Registration of Assurances.

E.—The Hindoo Law of Inheritance, Succession and Adoption.

F.—Mahomedan Law.

G.—The Indian Succession Act.

2nd.—Obligations arising from contracts.

3rd.—Civil Procedure.

4th.—The Law of Evidence.

5th.—The Law relating to Stamps.

6th.—The Law of Limitation.

7th.—Criminal Law and Procedure.

Regulations, Enactments, and Text-Books.

Regulations (Bengal) I., VIII., X., XIV., XIX., and XLIV. of 1793, and the Regulations and Acts by which the same have been altered; Act XI. of 1859, and the preamble to Regulation (Bengal) II. of 1793. Regulation (Bengal) VIII. of 1819; Act VIII. of 1865 (Bengal Council); Act VIII. of 1869 B. C. (Except as to candidates to practise in Orissa, Chota Nagpore, and Assam, who will be required, as heretofore, to pass in Act X. of 1859).

Act VIII. of 1869, B. C., except as above.

Macpherson on Mortgages; Act VIII. of 1871.

Dayabhaga and Mitakshara; Dattaka Chundrika, and Macnaghten's Principles of Hindoo Law, first seven Chapters.

Macnaghten's Principles of Mahomedan Law, except Chapter 9.

Act X. of 1865; Act XXI. of 1870.

Macpherson on Contracts; Act IX. of 1872.

Act VIII. of 1859; Act XXIII. of 1861; Act XI. of 1865.

Act I. of 1872.

Act XVIII. of 1869, and Act VII. of 1870.

Act IX. of 1871.

The Indian Penal Code (Act XLV. of 1860 and Act XXVII. of 1870); and the Code of Criminal Procedure, Act X. of 1872.

7. The application to the High Court for admission shall be made within one year from the time of the applicant's passing the examination, or within such further time as the Court shall for any special reason allow.

8. In order to qualify a person to present himself for the examination required by these rules for the higher grade—

1st.—He must hold a certificate of having passed the First Arts Examination of the University of Calcutta, Madras or Bombay, or the first public examination before Moderators at Oxford, or the previous examination at Cambridge, or the preliminary examination in Arts in one of the Scotch Universities, or the examination in Arts for the second grade at Durham, or the matriculation at the University of Dublin, or a certificate of having passed some other public examination which shall be certified by not less than three Judges of the High Court, as being in their opinion equivalent to one or other of the above-mentioned examinations.

2nd.—He must hold a certificate of having regularly attended a full course of Lectures in Law at one of the Colleges affiliated to the Calcutta University, or such Law Lectures elsewhere as shall be deemed by the High Court to be sufficient.

3rd.—He must produce a satisfactory certificate of good moral

character, and be above the age of 20 years.

9. Every candidate for examination for the higher grade shall, on or before the 1st of November in each year, give notice to the Secretary to the Board of Examiners of his intention to present himself at the ensuing examination, and he shall establish to their satisfaction that he possesses the qualifications declared by Rule 8 to be necessary for such candidates.

10. The Examiners, if satisfied that the candidate possesses such qualifications, shall thereupon enter his name, the name of his father, his place of residence, and his age, in a register, with a certificate to the effect that the Examiners are satisfied that he possesses the necessary qualifications.

11. Before the date of examination, every candidate for the higher grade shall pay a fee of Rs. 30 into the Government Treasury at Calcutta, and shall produce to the Examiners the receipt for the said sum of Rs. 30.

12. Any person who shall have passed the examination as a pleader of the higher grade, or who shall have obtained the degree of Bachelor in Law of one of the Universities of Calcutta, Madras or Bombay, or of Licentiate in Law of one of the said Universities, and who shall desire to be admitted to practise, shall pay into the Government Treasury of the district in which he shall intend to practise Rs. 25,

and shall on presentation of the certificate of the Examiners or of his Diploma, and the receipt for the said sum of Rs. 25, be entitled to apply to the High Court for admission and enrolment.

13. The application, together with the certificate and receipt required by Rule 12, shall be presented to the Judge of the district in which the applicant intends ordinarily to practise, and shall be forwarded by the Judge to the Registrar of the High Court, with such remarks as he may think fit to make thereon.

14. The name of the applicant and his place of abode, together with his father's name and place of abode, shall be affixed in some conspicuous place in the Court House of the Judge to whom the application is sent, and also in the High Court, at least six weeks before the applicant is admitted to practise.

15. The High Court may call for evidence of the respectability of the applicant in any case in which it may be deemed necessary.

16. Upon the applicant's being admitted and enrolled by the High Court, a certificate to that effect shall be forwarded by the Registrar of the High Court to the Judge of the district, who, upon the applicant's delivering and leaving with him a declaration in writing signed by the said applicant in conformity with the recital in the form of certificate given in the 2nd Schedule

to Act XX. of 1865, shall grant him a certificate as required by the said Act.

Qualifications for Pleaders of the Lower Grade.

17. Every person may be admitted as a pleader of the lower grade who shall produce a certificate from the Board of Examiners that he has passed, in the second class, an examination in the same subjects as are prescribed for pleaders of the higher grade under the provisions of Rule 6.

18. The application to the High Court for admission shall be made within one year from the time of the applicant's passing the examination, or within such further time as the Court shall for any special reason allow.

19. In order to qualify a person to present himself for examination for the lower grade—

1st.—He must hold a certificate of having passed the entrance examination of the University of Calcutta, Madras or Bombay, in the First or Second Class, or the first public examination before Moderators at Oxford, or the previous examination at Cambridge, or the preliminary examination in Arts in one of the Scotch Universities, or the examination in Arts for the second grade at Durham, or the matriculation examination at the University of Dublin or London, or a certificate of having passed some other public examination which shall be

certified by not less than three Judges of the High Court as being in their opinion equivalent to one or other of the above-mentioned examinations.

2nd.—He must produce a satisfactory certificate of good moral character, and be above the age of 20 years.

20. Every candidate for examination for the lower grade shall, on or before the 1st November in each year, give notice to the Examiners of his intention to present himself at the ensuing examination, and shall establish to the satisfaction of the said Examiners that he possesses the qualifications declared by Rule 19 to be necessary for such candidates.

21. The Examiners, if satisfied that the candidate possesses such qualifications, shall thereupon enter his name, the name of his father, his place of residence, and his age in a register, with a certificate to the effect that they have been satisfied that he possesses the necessary qualifications, and shall furnish the candidate with a copy of, or an extract from the said register.

22. Before the date of examination every candidate for the lower grade shall pay a fee of Rs. 20 into the Government Treasury, and shall furnish to the Examiners the receipt for the said fee of Rs. 20.

23. Any person who shall have passed for the lower grade under the preceding rules, and who shall desire to be admitted, shall pay

into the Government Treasury of the district in which he shall intend to practise Rs. 15, and shall on presentation of the Examiners' certificate and of the receipt for the said sum of Rs. 15 be entitled to apply to the High Court for admission and enrolment.

24. The application, together with the certificate and receipt mentioned in Rule 23, shall be presented to the Judge of the district in which the applicant intends ordinarily to practise, and shall be forwarded by him to the Registrar of the High Court, with any remarks which he may think fit to make thereon.

25. The name of the applicant and his place of abode, together with his father's name and place of abode, shall be affixed in some conspicuous place in the Court House of the Judge to whom the application is sent, and also in the High Court, at least six weeks before the applicant is admitted to practise.

26. The High Court may call for evidence of the respectability of the applicant in any case in which it may think it necessary.

27. Upon the applicant's being admitted and enrolled by the High Court, a certificate to that effect shall be forwarded by the Registrar of the High Court to the Judge of the district, who, upon the applicant's delivering and leaving with him a declaration in writing signed by the said applicant in conformity

with the recital in the form of certificate given in the 2nd Schedule to Act XX. of 1865, shall grant him a certificate as required by the said Act.

Rules for Mookhtears.

28. Every person may be admitted as a mookhtear who shall be qualified as hereinafter prescribed, that is to say:—

(1). If he shall be qualified to be admitted as a pleader of either grade: Provided that his application to be admitted as a mookhtear shall be made within one year from the time of his obtaining such degree or license, or within such further time as the Court shall for any special reason allow; or

(2). If he shall produce a certificate from the Examiners that he has passed an examination in the subjects prescribed from time to time by the High Court for the examination of mookhtears. Such subject shall until further notice be as follows:—

Code of Civil Procedure.

Law of Limitation.

Stamp Laws.

Small Cause Court Act.

Penal Code.

Code of Criminal Procedure.

Registration Act.

Evidence Act.

Contract Act.

29. In order to qualify a person to present himself for the examination required by these rules for mookhtears—

(1). He must hold a certificate of having passed the Entrance Examination of the University of Calcutta, Madras or Bombay, or a certificate of having passed the vernacular or minor scholarship examination, or some other public examination certified by the Director of Public Instruction or by an Inspector of Schools to be equivalent thereto.

(2). He must produce a satisfactory certificate of good moral character, and be above the age of 20 years.

30. Every candidate for examination as a mookhtear shall, on or before the 1st of December of each year, give notice to the Examiners of his intention to present himself at the ensuing examination, and shall establish to their satisfaction that he possesses all the qualifications declared by Rule 29 to be necessary for such candidates.

31. The Examiners, if satisfied that the candidate possesses such qualifications, shall thereupon enter his name, the name of his father, his place of residence, and his age in a register, with a certificate to the effect that they have been satisfied that he possesses the necessary qualifications, and shall furnish the candidate with a copy of or an extract from the said register.

32. Before the date of examination every candidate shall pay a fee of Rs. 15 into the Government Treasury of the district, and shall fur-

nish to the Examiners the receipt for the said fee of Rs. 15.

33. Any person who shall pass the examination as a mookhtear, and who shall desire to be admitted, shall pay into the Government Treasury of the district in which he shall intend to practise Rs. 10, and shall on presentation of the certificate of the Examiners and of the receipt for the said sum of Rs. 10 be entitled to apply to the High Court for admission and enrolment.

34. The application, together with the certificate and receipt required by Rule 33, shall be presented to the Judge of the district in which the applicant intends ordinarily to practise, and shall be forwarded by the Judge to the Registrar of the High Court, with such remarks as he may think fit to make thereon.

35. The name of the applicant and his place of abode, together with his father's name and place of abode, shall be affixed in some conspicuous place in the Court House of the Judge to whom the application is sent, and also in the High Court, at least three weeks before the applicant is admitted to practise.

36. The High Court may call for evidence of the respectability of the applicant in any case in which it may think it necessary.

37. Upon the applicant's being admitted and enrolled by the High Court, a certificate to that effect shall be forwarded by the Registrar

of the High Court to the Judge of the district, who upon the applicant's delivering and leaving with him a declaration in writing signed by the said applicant in conformity with the recital in the form of certificate given in the 2nd Schedule to Act XX. of 1865, shall grant him a certificate as required by the said Act.

38. If any person having passed the examination entitling him to be admitted and enrolled as a mookhtear shall fail to apply for such admission and enrolment for a period of one year, he shall not be admitted and enrolled, unless by special order of the High Court the time for such application shall be extended.

39. If any person having been admitted and enrolled as a pleader or mookhtear shall neglect to take out a certificate, or, having obtained a certificate, shall fail to renew it for a period of three years, he shall be suspended, and shall not be entitled to receive a certificate or to have his certificate renewed without further orders of the High Court.

40. Any person who, having been admitted as pleader or mookhtear, shall accept any appointment under Government, or shall enter into any trade or other business, shall give notice thereof to the High Court, who may thereupon suspend such pleader or mookhtear from practise, or pass such orders as the said Court may think fit.

41. Any person who shall hold any appointment under Government, or shall carry on any trade or other business at the time of his application for admission as a pleader or mookhtear, shall state the fact in his application for admission, and the High Court may refuse to admit such person, or pass such orders thereon as it thinks proper.

42. Any wilful violation of any of the above rules shall subject a pleader or mookhtear to suspension or dismissal.

43. These rules shall come into force on the 1st day of January 1874, except so far as they relate to the qualifications required by clause 1 of Rules 8, 19 and 20, respectively, as to which the rules now in force shall continue until the 1st of January 1875.

R. COUCH.

F. B. KEMP.

LOUIS S. JACKSON.

J. B. PHAR.

A. G. MACPHERSON.

W. MARKBY.

F. A. GLOVER.

DWARKANATH MITTER.

C. PONTIFEX.

E. G. BIRCH.

G. G. MORRIS.

11th September, 1873.

*Rules for admission of Vakeels in
the High Court.*

1. Every person, before being admitted to practise as a vakeel in

the High Court shall have obtained the Decree of Bachelor of Laws in the University of Calcutta, Madras or Bombay.

2. Except as mentioned in Rules 20 and 23, every person, before being admitted as a pleader in the High Court, shall serve a regular clerkship to some attorney or vakeel of the High Court to be approved by the Court before the contract is entered into, under articles of clerkship by contract in writing pursuant to the rules hereinafter contained, for the full period of two years.

3. The term of service required by the last preceding rule need not be all under one and the same contract, nor to one and the same person, but may be to different persons by virtue of an assignment or assignments, or by virtue of successive independent contracts, upon the dissolution of the original or succeeding contract.

4. The person under whom the articles shall be served shall during the whole period of the service, be actually practising as an attorney or vakeel in the High Court.

5. No person who is himself acting as clerk to an attorney or vakeel shall be able to take any clerk for service under articles.

6. No person shall be capable of service under these rules until he shall have passed the B. A. examination of the University of Calcutta, Madras or Bombay.

7. The contract in writing

whereby a person shall engage as aforesaid to serve as a clerk to any attorney or vakeel shall be filed with the Registrar of the High Court on the Appellate Side within one calendar month after the execution of the same, together with an affidavit by such attorney or vakeel that he has been himself duly admitted, and has been practising for five years as an attorney or vakeel, and that such contract has been duly executed by himself and by the clerk therein mentioned. And in every such affidavit shall be specified the name of the attorney or vakeel and his place of abode or business, and the name of the clerk and his place of abode, together with the day on which the contract was actually executed.

8. In case the articles of clerkship shall be assigned, the assignment shall be in writing, and shall be in like manner filed within one calendar month after the execution thereof, together with an affidavit that the same has been executed by all the necessary parties. And in every such affidavit shall be specified the name of the attorney or vakeel to whom the articles are assigned and his place of business, together with the day on which the assignment was actually executed.

9. If by reason of death or for any other good and sufficient reason an assignment of the articles cannot be obtained, a fresh contract in writing shall be entered into

by the clerk with the person under whom the service is continued, which shall be filed in the manner and with the affidavit prescribed by Rule 8.

10. In case the contract or assignment, together with the necessary affidavit, be not filed within the time specified, the same may be filed with the said Registrar after the expiration thereof; but the service of such clerk shall be reckoned to have been commenced or renewed from the date of filing such contract or assignment unless the Court shall otherwise order.

11. Every person who shall be articulated to serve as a clerk to a vakeel or attorney for the purpose of being admitted as a vakeel shall, during the whole period of such service, continue, and be really and actually employed by such attorney or pleader in the proper business, practice and employment of an attorney or vakeel.

12. Before any person shall be admitted as a vakeel in the High Court, he shall sign and file with such Registrar as aforesaid answers to the questions contained in the Schedule A, hereunto annexed; and the person or persons under whom he shall have served his articles shall sign and file answers to the questions contained in the Schedule B, hereunto annexed, as also a certificate in the form given therein.

13. In case the applicant should shew sufficient cause to the satis-

faction of the Court why the last rule cannot be fully complied with, it shall be in the power of the Court to dispense with any part of this rule which it may think fit and reasonable.

14. The applicant shall in all cases produce satisfactory testimonials as to his good character.

15. The applicant shall also, if required, sign and leave with the said Registrar answers in writing to such other questions as shall be directed by the Court touching the service and conduct of the applicant, and also, if required, attend the Court personally for the purpose of giving further explanation touching the same; and shall also, if required, procure the attendance of the person or persons with whom he shall have served his clerkship as aforesaid to answer either personally or in writing any questions touching such service or conduct, or shall make proof to the satisfaction of the Court of his inability to procure the same.

16. Upon compliance with the aforesaid rules, if the Court shall be satisfied as to the fitness and capacity of the applicant, a certificate shall be granted to him in the following form:—

In pursuance of the rules of the High Court relative to the admission of vakeels, it is hereby certified that A. B. has complied with the requirements of the said rules, and that he is a fit and proper person

to be admitted to practise as a vakeel in the High Court.

(Signed) C. D.,

A Judge of the High Court.

17. Any person intending to apply to be admitted to practise as a pleader in the High Court shall also give one month's notice in writing to the Registrar aforesaid stating his intention, and shall also insert in the *Calcutta Gazette* a like notice for four successive weeks prior to his application.

18. Any person who has been admitted to the Degree of B. L. in the University of Calcutta, Madras, or Bombay, and who shall produce the certificate mentioned in Rule 16, shall, after giving the notice required by Rule 17, be enrolled as a vakeel of the High Court.

19. Any person who has been admitted to the Degree of B. L. in the University of Calcutta, Madras, or Bombay, and who shall prove to the satisfaction of the Court that he has *bond fide* practised for four years as a pleader in one or more of the Courts of the mofussil subject to the jurisdiction of the High Court, and that he is a person of good character, may, after giving the notice required by Rule 17, be admitted to practise in the High Court as a vakeel without service under articles.

20. Every person applying to be admitted under the last rules shall, one month prior to admission, leave with such Registrar, as aforesaid, answers to the questions contained

in the Schedule C hereunto annexed, and also a certificate or certificates in the form contained in Schedule D hereunto annexed.

21. In case the applicant should shew sufficient cause to the satisfaction of the Court why the last rule cannot be complied with, it shall be in the power of the Court to dispense with any part of this rule upon such terms as it may think fit and reasonable.

22. An applicant under Rule 19, shall in all cases produce satisfactory testimonials as to his good character; and shall also, if required, leave with the said Registrar answers in writing to such questions as the Court shall direct touching the qualification of such person to be admitted as a vakcel in the High Court; and shall, if required, attend the Court personally for the purpose of giving further explanation touching the same.

23. Any attorney of the High Court who shall establish to the satisfaction of the Court that he has *bona fide* practised as such for the period of three years, and that he is a person of good character and ability, may be admitted to practise in the High Court as a vakcel.

24. These rules shall come into force on the first day of January 1874.

R. COUCH.

F. B. KEMP.

LOUIS S. JACKSON.

J. B. PHEAR,

A. G. MACPHERSON.

W. MARKBY.

F. A. GLOVER.

DWARKANATH MITTER.

C. PONTIFEX.

E. G. BIRCH.

G. G. MORRIS.

11th September, 1873.

SCHEDULE A.

Questions as to due service of articles to be answered by the applicant.

1. What was your age at your last birthday?

2. Have you served the whole term of your articles at the place where the person or persons to whom you were articed or assigned carried on his or their business? and, if not, state for what reason.

3. Have you at any time during the term of your articles been absent without the permission of the person or persons to whom you were articed or assigned? and, if so, state the length and occasions of such absence.

4. Have you during the period of your articles been engaged, or concerned, in any, and, if any, what profession, business or employment, other than your professional employment as clerk to the person or persons to whom you were articed or assigned?

5. Have you since the expiration of your articles been engaged or concerned, and for how long a time, in any, and if any, what pro-

fession, trade, business or employment, other than the profession of an attorney or vakeel?

SCHEDULE B.

Questions to be answered and certificate to be given by the person or persons with whom the clerk may have served any part of his time under articles.

1. Has A. B. served the whole period of his articles at the place where you carry on your business? and, if not, state the reason.

2. Has the said A. B. at any time during the period of his articles been absent? and, if so, state the length and occasions of such absence.

3. Has the said A. B. during the whole period of his articles been engaged or concerned in any, and, if any, what profession, business, or employment, other than his professional employment as your articulated clerk?

4. Has the said A. B. during the whole period of his clerkship, with the exceptions above-mentioned, been faithfully and diligently employed in your professional business of an attorney [or vakeel, *as the case may be* ?

5. Has the said A. B. since the expiration of his articles, been engaged or concerned, and for how long a time, in any profession, trade, business or employment, other than the profession of an attorney or vakeel?

And I do hereby certify that the said A. B. has duly and faithfully served under his articles of clerkship [or assignment of articles, *as the case may be*] bearing date, &c., for the term therein expressed, and that he is a fit and proper person to be admitted as a vakeel of the High Court.

SCHEDULE C.

1. What was your age last birthday?

2. What is the date of your enrolment as a pleader, and where were you enrolled?

3. Have you practised in one or several Courts? State the periods during which you practised in each, and the dates of the beginning and end of each period.

4. Have you at any time been engaged or concerned in any, and, if any, what profession, business, or employment, other than that of a pleader? If so, when and for what period?

SCHEDULE D.

I, C. D., District Judge [or Subordinate Judge, or Munsiff, *as the case may be*] do certify that to the best of my belief, A. B. practised in my Court regularly as a pleader from the day of 18 to the day of 18, and that he was diligent and faithful in the performance of his duties, and that he is a fit and proper person to be admitted as a vakeel of the High Court.

(Signed) C. D.

BENAMEE TRANSACTION—Concluded. and after it, this suit was brought by Buhoree Lall against his heirs for the redemption of the talook and possession of it; alleging that the mortgage-debt had been paid off by the receipt of the profits, and if not, that he was ready to pay what might remain due. The defence was that the purchase was made by Buhoree, in his own name, as a *benamee* purchaser for Brijlall Opadbia, and with his money; and that the attempt by Buhoree to set up title in himself was fraud. The question was whether this defence could in law be made available. The Privy Council decided that section 260 is confined to a suit brought against the certified purchaser, and to a specific direction as to what shall be done with that suit, *viz.*, that it shall be dismissed with costs. The present suit being the converse of that pointed out in the above section, there is no bar to preclude inquiry into the real title.*

Section 260 of Act VIII. of 1859 is no bar to a suit for possession of a property by the execution-purchaser which property was previously sold in execution of decree against the same judgment-debtor and was purchased by the judgment-debtor *benamee*.

Case.—Plaintiff sued to recover possession of a tank on the allegation that she purchased it in execution of a decree against the judg-

ment debtor, that she was put in possession; and that she has been subsequently ousted by the judgment-debtor and other persons. One of the defendants alleged that previous to the purchase by the plaintiff, her husband in execution of a decree against the judgment-debtor purchased the same property; that she was in possession and the judgment-debtor had no right whatever to the property. The plaintiff urged that this purchase was a mere sham; that in fact the judgment-debtor purchased the property *benamee* and was himself in possession at the time when the property was put up for sale and purchased by the plaintiff. The lower Appellate Court found for the plaintiff. It was urged on behalf of the defendant that under section 260 of Act VIII. of 1859 the suit cannot lie. But the Calcutta High Court decided that this case did not come under the purview of that section.*

It was held by the Privy Council that the provisions of Act VIII. of 1859, Sec. 260 were designed to check the practice of making *benamee* purchases at execution-sales, *i. e.*, transactions in which one party secretly purchases on his own account in the name of another party. They cannot be taken to affect the rights of members of a joint Hindoo family, who by the operation of law, are entitled to treat as part of their common property an ac-

quisition, howsoever made, by a member in his sole name, if made by the use of the family funds.*

A *benamee*, or collusive sale of property in execution of a decree will not save it from re-sale in execution by a decree-holder.†

A *benamee* purchase by a judgment-debtor of his property sold in execution of decree against him is liable to be set aside and the property resold in satisfaction of decree.

Case.—A property was sold in execution of decree and was purchased by the servants of the judgment-debtors *benamee* for the judgment-debtors who remained in possession. A judgment-creditor brought a suit to set aside this sale as fraudulent and to make the property liable. The Lower Court held that the suit would not lie under Section 260 of the Civil Procedure Code. The Calcutta High Court held that the suit will lie, observing that “the section quoted, refers only to suits between a *benameedar* and the beneficial owner, and not a case of the present nature where a gross fraud has been practised upon a third party”‡

The party who holds the real beneficiary interest in the property should come forward as plaintiff.

Case.—The plaintiff sued to set aside a sale in execution of a decree against Hubeebul Hossein. He alleged in his plaint that Hubeebul Hossein, in consideration of Rs. 5,000 absolutely sold to him whatever rights and interests he had in the property claimed. But the evidence of Kedar Nath Bose, who was examined as a witness for the defendant, and who says that he was Hubeebul Hossein’s pleader in almost all cases, shows that he was the real purchaser. He says he and the plaintiff, who is his cousin, are living jointly, and the property, if recovered, will become their joint property. It has been objected for the respondent that the suit ought to have been dismissed, because the plaintiff was not the real purchaser. In *Fuzze-lun Bibee versus Omdah Bibee*, X., Weekly Reporter, 469, it was held that, where a purchase was made in the name of another, the real purchaser must be the plaintiff, and the suit cannot be maintained in the name of the other person. Taking the evidence of Kedar Nath Bose to be entirely true, he ought, by the rule of Courts of Equity, to have been a coplaintiff; and for his not being so, the decree might be reversed on an appeal; the reason being that Kedar Nath Bose will not be bound by the decree in this suit. We think this would be a sufficient reason for our dismissing this appeal. A false case as to the purchase has been put forward in the

* XIX., W. R., p. 356.

† III., W. R., Misc. App., p. 4.

‡ I., W. R., p. 329.

plaint; and we have little doubt that this was done designedly, and in order to conceal the part which Kedar Nath Bose had taken in the transaction.*

In a suit brought to recover property, the Calcutta High Court held that it ought to have been brought by the real owner, and not by a person who claims to be owner by virtue of a transaction which is found not to be a real one †

Benamée purchases occur every day, and if the party whose name is used sets up no claim, and if there appear to have been long continued possession on the part of the person claiming to be the beneficial owner, that would quite sufficiently dispose of the mere use of the *furzee* name in the transaction.

Case.—Plaintiff brought a suit, alleging that the property claimed was purchased by her in the name of another person who was made a defendant in the suit. The *benamedar* did not set up any claim, but yet the lower Court dismissed the plaintiff's claim stating that "the plea of *benamée* transaction advanced by the plaintiff is unfit for hearing by a Court of Justice, because agreeably to general principles, the party in whose favor a deed is executed must be considered as the grantee of the deed." This judgment was set aside by the Cal-

cutta High Court who observed "as to the question of *benamée*, the Subordinate Judge must be well aware that *benamée* purchases occur every day, and that if the party whose name is used sets up no claim, and if there appear to have been long continued possession on the part of the person claiming to be the beneficial owner, that would quite sufficiently dispose of the mere use of the *furzee* name in the transaction."*

A certified purchaser at a sale for arrears of Government Revenue, suing to recover possession of which he has been ousted, is not debarred from the benefit of Section 36, Act XI. of 1859, and from pleading that the defendants were not entitled to sue him as being merely a *benamedar* †

Under Regulation XI. 1822, a *benamée* purchase for the defaulting proprietors at a sale for arrears of revenue is not absolutely illegal and void. Where the manager of a joint Hindoo family re-purchases *benamée*, the presumption is that the property so re-purchased is held by him for the benefit of the joint family.‡

A wife suing for confirmation of possession of property alleged to have been purchased by her in the name of the defendant must rest her case upon the plea that the pur-

* XIX. W. R., p. 435.

† XX. W. R., p. 72.

* XIV., W. R., p. 58.

† 5. W. R., p. 56.

‡ 5. W. R., p. 154.

chase by her from her husband was *bona fide*, which must be proved before any decree is given to her.*

Before shutting out from execution a decree-holder who has taken by assignment, on the ground that he is a mere *benamtee* holder from one of the judgment-debtors, it is necessary to be very careful and to ascertain beyond a doubt that the fact is so †

Where there is an allegation that a lease is held *benamtee*, it is not sufficient for the party in whose name the lease is drawn out to produce the document, but it is necessary for him to prove that he has the beneficial interest in the property, since if the receipts, filed by the person who alleges that he holds it *benamtee*, came into his hands upon payment of rent by him to the zemindar, they tend to show that the beneficial interest was in him.‡

The representatives of, or private purchasers from, a party selling *benamtee*, in fraud of creditors, or pleading such a sale in order to recover the property afterwards, are bound equally with the original defrauders, and cannot take advantage of what must be held to be their own wrong.

Case.—In a suit to recover possession of certain lands held by

the defendant, on the ground that the conveyance by their father to the defendant was a *benamtee*, one made in fraud of creditors, the High Court of Calcutta held that the suit would not lie.*

A conveyance of an early date followed by mutation of names in the Collector's records, if proved to be a nominal transaction in fraud of creditors (the possession remaining with the original owner and the transaction being held between very near relations), was held not to defeat a good title though subsequently acquired.†

In determining the right to property seized in execution, the Court must not declare a person claiming as purchaser to be a *benamteedar* for the debtor upon suspicion merely, but its decision must rest upon legal grounds established by legal testimony.‡

Property purchased by a member of a joint family with money out of the common estate, is family property, even if purchased in the name of his son. Even if the son is a certified purchaser at a sale under Act I. of 1815, the other members of the family are not debarred by S. 21 from claiming a share of the purchase as joint property.||

* 5, W. R., p. 177.

† VIII., W. R., p. 26.

‡ VII., W. R., p. 209.

* III., W. R., p. 221.

† III., W. R., p. 10.

‡ I., W. R., p. 217.

|| XIX., W. R., C. R., p. 223.

titled to get the wassilat, and as the money was in deposit and as this appeared to be a case which came under the provisions of the Section quoted, directed that a certain sum, namely, Rs. 532-15-3 for wassilat and costs, out of the amount in deposit, be made over to Bama Soonduree, and that the residue be paid to Tarinee Kant Lahoree. On appeal, the Judge has reversed this order on the ground "that the mesne profits which under the provisions of Section 11 Act XXIII. of 1861 are assessable by the Court executing the decree are only such as have been by the decree made payable in respect of the subject-matter of the suit between the date of the suit and the date of the execution of the decree;—any question of mesne profits not determined by the Court making the decree not being properly cognizable by the Court executing the decree." Now, in the first place, we may observe that, during the protracted litigation in respect of these excess lands when and after Bama Soonduree was successful in getting back the excess lands, she claimed wassilat for a considerable period, the special respondent before us never took the objection that the Court had no jurisdiction under Section 11 Act XXIII. of 1861. His objection was that the claim for wassilat was barred under the statute of limitation. That objection was rejected, and the present one as to the jurisdiction has

now been taken, evidently well knowing that if that objection can be maintained and Bama Soonduree is referred to a separate suit for wassilat, it would be of no good to her, inasmuch as her claim for wassilat is now barred.

Now in this case it seems to us that the question which has arisen between the parties is a question which relates to the execution of the decree. Tarinee Kant Lahoree, in execution of the original decree, having taken possession of lands in excess of what he was entitled to take possession of under the decree, the question arose in execution of that decree on the objection of Bama Soonduree. Das ee, and that question was decided in her favor, and we think that under the provisions of Section 11 the question of wassilat being a question which arises between the parties to the suit with reference to the execution of the decree, must be determined by the Court executing the decree, and not by a separate suit; and there is a case which has been cited to in Volume VII., Weekly Reporter, Civil Rulings, page 372, Radha Gobind Shah, v. Brojendro Coomar Roy Chowdhry, which we think is in point.

We, therefore, reverse the decision of the Judge and restore that of the first Court in so far as it declares the right of Bama Soonduree to recover without a separate suit the amount of wassilat to

which Bama Soonduree is entitled. The Judge will find whether Bama Soonduree is entitled to the sum claimed by her or not.

PRIVY COUNCIL.

THE 5TH NOVEMBER, 1873.

Appeal from Calcutta High Court.

MUNNOO LALL, *vs.* LALLA CHOONEE

LALL and others

Purchase without notice of mortgage

— *Misrepresentation by mortgagee*

— *Mortgagee's loss of lien against that purchaser.*

A man who has represented to an intending purchaser that he has not a security, and induced him under that belief to buy a property, cannot, as against that purchaser, subsequently attempt to put his security in force.

This appeal has been heard *ex parte*, and after considering the opening of Mr. Leith, which has been made in a fair and candid manner, it appears that there are concurrent findings of two Courts below upon a question of fact decisive of the case, and decisive of it against the appellant.

The circumstances are very short. It appears that a man of the name of Reep Bhunjun Singh was in debt, and at the time possessed some considerable estates. The appellant, Munnoo Lall, had been his banker and advanced money to him, and, amongst other securities, he held a mortgage of the date of 9th October 1863 from Reep Bhunjun Singh of Mouzah Shabpore. It was an ordinary mortgage to secure the sum of Rupees 20,000. Subsequently to that mortgage, on the

9th of August 1864, Reep Bhunjun Singh sold the mouzah to the respondents, or to those whom the respondents represent, the bulk of the consideration given for the purchases being the money which was due to the purchasers from Reep Bhunjun Singh, for which they had obtained decrees. Besides the amount of the decrees, a small sum was paid on each of the purchases in cash. Four years after these purchases the appellant commenced this suit, which is a suit to enforce payment of his mortgage bond against the respondents, and prayed a sale of the mouzah. The defence set up by the answer, amongst others, was the equitable defence that Munnoo Lall could not enforce his mortgage bond as against these respondents, because at the time of their purchase he had been present when the negotiations for the purchase took place, and in answer to inquiries, had led the purchasers to believe that he had not any lien upon the estate, consequently that he had not the mortgage bond which he sets up in this suit. The defence is made in the answer, as Mr. Leith observed, in not very precise terms, but they say that the purchase was made in consultation with the plaintiff and his son, and at that consultation they were led to believe that there was no such lien as the mortgage of 1863.

The issues were settled, and two only of them are material. The first was that the bond was alto-

gether collusive and made without consideration for the purpose of defeating any subsequent purchasers; and the second, which has become the material one, is "Was its existence"—that is, the existence of the mortgage deed—"intentionally kept secret from the defendants at the time of the purchase?" There was a third issue, which raised the question, whether the litigated property being under attachment at the time of the execution, the mortgage deed was thereby rendered nugatory. Upon the first trial of these issues, the Judge of Shahabad, having found the third issue against the plaintiff, was of opinion that it decided the cause, and that it was immaterial for him to determine the other issues. However, on appeal to the High Court, that Court reversed the judgment of the Judge of Shahabad, and remanded the case for trial upon the first two issues to which attention has been called, and amended the second issue by inserting the words "by plaintiff" after the words "was its existence intentionally kept secret." The parties went down to try that issue, which was in effect whether the plaintiff had intentionally and designedly, and with a view to deceive the defendants, kept the existence of his mortgage secret from them. That issue rises a pure question of fact. It appears that there was evidence on both sides, the witnesses on behalf of the respondents giving testimony that the negotiations took place in the presence of the appellant, Munnoo Lall; that inquiries were made whether he had any mortgages, it being expected from his relation to the vendor that he might have them, and that in answer to those inquiries, he distinctly stated that he had none; and documentary evidence was also given in support of the affirmative of the issue. Some evidence, undoubtedly, was given, on the other side of a contrary character. The Judge of Shahabad, who heard the witnesses, has given credit to those who were called on the part of the defendants. He distinctly gives credit to them, and he thinks that their evidence is corroborated not only by the documents, but by the probabilities of the case. On appeal to the High Court, the High Court affirmed his finding, after much consideration given by themselves to the evidence. The Chief Justice, who analysed the evidence given by the witnesses, has pointed out various circumstances which appear to him to corroborate them. The learned Chief Justice thought that Munnoo Lall was present at the time of the negotiations, and that inquiries were made of him. Their lordships think it is a natural conclusion to draw from all the circumstances that some inquiry would have been made of him, and they think it must be pretty evident from the whole circumstances of the case that if the defendants had had

notice of the mortgage held by the appellant, they would have hesitated to purchase as they did. They took the estate, giving up their decrees, and also an attachment which they held. Their lordships agree with what is stated by Mr. Leith that there may have been no duty upon Munnoo Lall voluntarily, and without being asked, to disclose his security, but the case is not put simply upon the omission to give notice, but upon an actual misleading of the defendants, not merely by the act itself, but by the express declarations of Munnoo Lall himself.

Under these circumstances, their lordships think that they could not have departed from their ordinary rule of not disturbing concurrent judgments upon a question of fact of two Courts, even if they had felt some doubt upon the finding. But after the discussion of this case, their lordships are disposed to agree with the findings of the Court below.

If, then, the issue has been properly found, it is really decisive of the case, because it supports the plain equity, that a man who has represented to an intending purchaser that he has not a security, and induced him under that belief to buy, cannot, as against that purchaser, subsequently attempt to put his security in force.

The result is that their lordships will humbly advise Her Majesty that the judgment of the High Court be affirmed and this appeal dismissed, with the costs incurred

by the respondents previous to the hearing.

CALCUTTA HIGH COURT.

The 4th September, 1873.

THE HONORABLE J. B. PHEAR and
G. G. MORRIS, *Judges.*

MOHUNT NURSINGH DOSS (*Defdt.*)

Appellant,

vs.

MOONSHEE KUMROODDEN and others,
(*Plaintiffs*) *Respondents.*

Failing to execute a decree for possession—Subsequent suit—Res Judicata.

The plaintiff sued to obtain possession of a certain property from the defendants and obtained a decree. Failing to execute that decree, he brought a second suit for obtaining possession for the same cause of action against the same defendants. *Held* that the matter of the subsequent suit was *res judicata*.

PHEAR, J.—We think that the Subordinate Judge has not succeeded in obtaining a complete grasp of this case. The plaintiff sued to obtain possession of a certain property from the defendants. The cause of action was that he bought this property in the year 1857, and that the defendant has obtained possession of it and is wrongfully keeping him out of it. He is met by two defences, or, as they are commonly called, pleas in bar: first, that the suit is barred by limitation; and second, that you the plaintiff brought a suit to recover possession of this very same property against me and another person in 1862, and finally got a decree against us on the 9th

February 1863; nothing new has happened since that date, and therefore for this reason (defendants say) this second suit is brought on the same cause of action as that first suit was, and is barred by reason of the subject being *res judicata*.

The Lower Appellate Court seems to be of opinion that the decree of February 1863 was in fact a decree in favour of the plaintiff, and against the defendant and others, for possession of this very same property, and on that account alone it says the present suit is not barred. But clearly, unless the present suit is founded upon a cause of action which has arisen since that decree was passed, if the want of possession on the side of the present plaintiff is nothing more than a continuation of his want of possession in February 1863, then the ground of this suit is nothing more nor less than that which was the ground of the suit of 1862. The matter in contest between the parties, namely, the wrongful holding of this property, is precisely the same matter as that which was adjudicated upon on the 9th February 1863 and for the same cause. It seems to be clearly *res judicata*. The plaintiff, having got a decree against the defendants in that suit, ought to have obtained satisfaction of the decree by ordinary process of execution. If the decree entitled him to obtain khas possession, he could have got by the aid of the Court

actual possession of the land. If it only gave him a right to receive rents of the land, he could, on the foundation of the decree, compel payment of those rents to himself. He has not taken this course; but he brought a suit over again for the same cause of action against the same people, so far as the defendants are concerned, as those against whom he brought the suit of 1862. If he is allowed to keep the decree which he obtained in the Court below, there is nothing whatever to show that it will be of more fruitful result to him than the decree of 1863. He may go on *ad infinitum* bringing suits of this kind—the truth is that the matter of this suit is *res adjudicata* by reason of the decree of the 9th February 1863. But if the Lower Appellate Court has made a mistake in thinking that the decree of February 1863 dealt with the same rights and same cause of action as are involved in the present suit, then that decree must for the moment be put on one side altogether; and it is incumbent upon the plaintiff in the present suit, independently of that decree, to show exactly when his present cause of action against the defendant arose, that is, when his enjoyment of the property last ceased when he was deprived of it by the wrongful acts of the defendant of which he now complains, and when for that cause he first could have come into Court as he now does to vindicate his

right against the defendant. The plaintiff has not attempted anything of this kind. It appears from the argument of the learned pleaders that there is very good reason why he should not have done so, namely, that he never has been in possession by actual enjoyment of this property ever since he bought it in 1857. It would thus be impossible for him to prove that a fresh cause of action had arisen between himself and the present defendant since the date of decree of the 9th February 1863. It may be, as the Lower Appellate Court remarks, that the right to the property in suit has been finally determined between the plaintiff and the defendant, but that right does not enable him to maintain a suit, if the cause of action itself accrued so far back as to bar the suit. And there is no force in the argument that, since the decree of February 1863, a new cause of action has arisen by reason of the disputed property having been partitioned off by a butwarrah and assigned to the defendant, because the property has been in no way changed, and has throughout remained in the possession of the defendant.

It therefore appears to us that the Lower Appellate Court was wrong in its decision; and it seems further to be useless to send back the case for re-trial upon the issue which was not directly considered by the Subordinate Judge, because there are no materials before the

Court upon which the plaintiff could maintain the affirmative of this issue. We therefore reverse the decision of the Lower Appellate Court, and dismiss the plaintiff's suit with costs.

MYSORE JUDICIAL COMMISSIONER'S COURT

The 8th August, 1872.

HONNASETIL, vs. CHINNA KRISTNAMA NAIDU

Unstamped Hundi—Subsequent Stamping.

When a letter requesting payment to the holder is not a Bill of Exchange and is not stamped it may be stamped under Section 20 of Act XVIII. of 1869 and be admissible in evidence.

Reference under Section 28 of Act XXIII. of 1861 by the Judicial Assistant of the Hassan District in Case No 51 of 1872.

This is an action of debt for the recovery of Rupees 73-9-0, being the price, with interest, of cloths which the plaintiff sold to the defendant at Belûru in the Hassan District. On the 16th October 1870 defendant drew an order, marked A, on one Aswatia of Belûru, who neither accepted nor honoured it. On the ground that the dishonoured Order A saves his claim from limitation, plaintiff has sought the remedy. Defendant did not put in an appearance, but allowed the case to go by default. Plaintiff was, therefore, heard *ex parte*. He has proved to the satisfaction of the Court the *bond fide* nature of his

claim and the genuineness of the Exhibit A. I, therefore, direct that an *ex parte* judgment be entered against the defendant, contingent upon the opinion of the Judicial Commissioner as to the proper construction to be put upon the Exhibit A, upon which its admissibility as evidence mainly depends.

2. The Exhibit A is translated *verbatim* hereunder, for the sake of ready reference.

"To the presence of M. R. R. our Aswatia, Cloth Merchant

"Whereas your Chinna Kristnama Naidu sends his compliments. Up to this time I am getting on well here with others, and please let me know the welfare of you all. Pay to the bearer of this letter Vysira Honnasetti of Beluru, immediately on presentation of this letter, Government Rupees 62-11-0 and get the payment endorsed at the bottom of this Hundi letter, and place the amount to my account sending me an answer. *If perhaps you cannot pay the above whole amount in one lump, you can make two instalments, but pay at any rate forthwith and write to me on the subject.*

(Sd.) Chinna Kristnama Naidu."

"MANDIEM,
"16th October 1870." }

3. The point for decision is whether or not this is a Bill of Exchange within the purview of Act XVIII. of 1869. Definition 3 under Section 3 of the Act comprises

every instrument whereby a person is ordered to pay to another a specified sum of money. Sections 8 and 26 require the holder or the drawee of a Bill of Exchange to stamp it if it comes into his hands unstamped. Section 28 restricts the mode of stamping a Bill, while Section 19 declares that no person taking a Bill of Exchange either in payment or as a security or by purchase or otherwise, shall be entitled to recover thereon or to make the same available *for any purpose* unless at the time he so takes it, the proper stamp is affixed thereto and cancelled. If Exhibit A is looked upon as a Bill of Exchange, Section 19 is fatal—for, the instrument shall not be available *for any purpose*, even as an acknowledgment to stop the running of the period of limitation—not to speak of the penalties prescribed in Section 30 of the Act. Now if the requisites of a Bill of Exchange are a Drawer, a Drawee, a Payee, and a specified sum of money, and no more, Exhibit A may be treated as such, notwithstanding that it is worded in the form of a private letter; for, it is a maxim of law that bad grammar does not vitiate a contract. *A fortiori* the Legislature has not taken the trouble to prescribe an authoritative form; and according to Section 763, Norton on Evidence, construction should be by the spirit rather than the letter, it being a maxim *Qui hoeret in litera hoeret in cortice*.

4 On the other hand, it appears to me that Section 3 of the Act does not profess to be exhaustive. In construing a Statute we may look back to the sources of it, which, in the present case, is the current of decisions of the English Courts as exemplified by Treatise writers of acknowledged authority. According to Broom's Treatise, page 242, Smith's Mercantile Law, page 201, and Chapter XI., Byles on Bill of Exchange, a Bill of Exchange is a *written order by one person to another for the payment of money to a third party at a specified time absolutely and at all events*. In the contract under review there are all other ingredients but certainty as to time of payment. *In re Alexander Thomas*, quoted by Broom a Bill payable 90 days after sight, or *when realized*, was held to be bad, because it was made payable on a contingency. Smith, in page 202 of his Mercantile Law, says that if a Bill contains any condition precedent, or defeasance, or be payable at an uncertain time or out of an uncertain fund, it is no Bill or Note. The payment, under the Exhibit A, by the drawee is to depend upon his convenience and circumstances in life either by one or two instalments. Thus for want of certainty as to time of payment I am of opinion that the instrument A is not a Bill of Exchange. in which case it does not come under the prohibition in Section 19 of the Stamp Act. It may consequently be

stamped under Section 20, and be available as an instrument affording a fresh starting point to the plaintiff.

(Signed) V. N. TIRUMALACHARIER,
*Judicial Assistant Superintendent,
Hassan District.*

1872.

From the Officiating Judicial Commissioner in Mysore, to the Judicial Assistant of the Hassan District, dated 8th August 1872.

General No 1173 } of 1872.
No. 209 }

The Judicial Assistant's No. 175 of the 3rd Instant, submitting for decision under Section 28 of Act XXIII of 1861, statement of Small Cause Case No. 51 of 1872, on his file, *Honnasetti, v. Chinna Kristnama Naidu*.

In reply he is informed that the Officiating Judicial Commissioner is of opinion that the Judicial Assistant has correctly received the letter in question in evidence.

(Signed) R. L. MANGLES,
Officiating Judicial Commissioner.

MADRAS HIGH COURT.

The 15th September, 1873.

OREE MEERAH SAHIB,
versus

C. MOHIDEEN SAHIB.
Over-due Note—Equities.

The endorsee of an over-due note takes it subject to all the equities with which it may be encumbered, but not to claims arising out of collateral matters, as a set-off.

This was an appeal from the judgment of Mr. Justice Holloway

in Suit No. 544 of 1872 on the Original Side of the High Court. The plaintiff brought a suit to recover Rupees 6,196.8-0, being principal and balance of interest due in respect of a Promissory Note, executed by the defendant in favor of Seevaram Mahomed Gunny Sahib, for Rs. 4,500, dated the 10th September 1869, and endorsed over by Gunny Sahib, to plaintiff.

INNES, J.—The case in the Court below turned on the question whether the note was taken by the plaintiff in circumstances which discharged the defendant from liability to pay the plaintiff; and it appears that the circumstances insisted on by defendant were that plaintiff had full notice of the payee having been discharged. The note was given by defendant to Gunny for 4,500 Rupees advanced. Gunny's accounts are not before the Court, nor are the accounts of defendant substantially impeached, and they must be taken as between plaintiff and defendant to show accurately the state of the accounts between Gunny and defendant. These accounts show that there were mutual dealings between the parties, subsequent to the making of the note, which in the end turned the account in favour of defendant. Defendant says there was a settlement of account at the close of the dealings, at which plaintiff was present; that it was found that Gunny was indebted to defendant, and that the note ought to be de-

livered up; and that Gunny promised to deliver it up, but deferred doing so, and at length endorsed it to plaintiff.

The learned Judge before whom the case was tried was not satisfied that the plaintiff had notice, and it would appear from counsel's note that he expressed himself as regarding the evidence to the alleged settlement with suspicion.

If I were able to hold that there had been a settlement and discharge, I should hold on the authority of *Bartrum v. Caddy*, 9, Ad. and E., 275, that this was a good defence as against an endorsee, though for value and without notice. There is no written record of the settlement, and I am not satisfied from the evidence that any settlement took place. It appears very improbable that a person should have taken the note, who not only had full notice that it was discharged (as he must have had, if the statements of the defendant's witnesses as to the settlement are true), but who besides had received this notice of the discharge of the note from so many people (one of whom was defendant) that he could have no chance of suppressing the fact. Defendant and Gunny are represented by the evidence as having looked over defendant's accounts, and agreed upon the result as showing a balance against Gunny. A final settlement of accounts would hardly be undertaken in so casual haphazard a way. One

would expect that Gunny would, at the settlement, have produced his accounts or a memo. of them and compared them with those of defendant. The accounts would ordinarily be signed with a memo. of the settlement and its result, and it is especially unlikely that with the note still in Gunny's hands, and in form negotiable, defendant would have been satisfied with the mere verbal admission of Gunny that there was nothing due upon it. Yet no memo. was taken from Gunny of the state of the account, nor was he required to give an acknowledgment of the discharge of the note. The casual presence of witnesses living at Guriattum, a considerable distance from Madras, is, to say the least, suspicious, while the fact that no persons of the neighbourhood should be called in to witness the settlement, is certainly not in favour of the truth of the evidence. Then the conduct of defendant in taking no active steps to recover the note from Gunny, with whom, it appears from defendant's evidence that he was at that very time engaged in litigation, is very much against the truth of the statement and evidence to the effect that Gunny promised to return the note at once. I therefore disbelieve the evidence as to the settlement. The other circumstances are not sufficient of themselves to warrant the inference of fact that the note was discharged, and that plaintiff had notice of the discharge.

There is, however, the further contention that the note was over-due. The endorsee of an over-due note takes it subject to all the equities with which it may be incumbered, but not to claims arising out of collateral matters, as a set-off. A bill or note payable on a specified date, or after a specified time, is mature when the date or time arrives, and if subsequently endorsed, is endorsed over-due. But this is a note payable on demand, and the question is when such notes are to be treated as over-due. Such an instrument has two purposes of existence: one to secure the reimbursement of the payee by the maker; the other the negotiation of it by the payee. One or other of these purposes is intended ordinarily to be fulfilled without unreasonable delay. But what is to be considered unreasonable delay must necessarily vary with the varying local circumstances in which notes, on demand, are ordinarily given. Accordingly the cases in England and America show a great variation in the decisions as to unreasonable delay. In some cases there has been evidence of demand for payment having been made; and this has been held in England to be an indication of the lapse of a reasonable time, and the note subsequently negotiated has been regarded as over-due.

In *Brooks, v. Mitchell and Borough, v. White*, it was noticed that there was no evidence of demand

for payment, and that they could not, therefore, be put upon the footing of those cases in which evidence of a demand had been held sufficient to warrant the Court in treating the note as over-due. From these and other cases the rule has in England been deduced, that before a note on demand can be treated as over-due in the hands of an endorsee, there must be some evidence of a demand.

Now it is the defendant's case, and his accounts support his assertions, that the account had turned in his favour. This being so, I find it difficult to believe Gunny's statement that he made a demand for what both parties must well have known was not due. I cannot, therefore, in support of the view that the note was over-due, make use of the evidence to a demand having been made. If I were at liberty to follow the American cases, I should hold that the length of time, two years and eleven months, during which the note was in Gunny's hands without negotiation, was sufficient, without any evidence of demand for payment, to show that the note was over-due.

But it appears to me that evidence of a partial discharge is stronger evidence of a note's being over-due than demand of payment can be; and this, there is no doubt, we have in this case. For the evidence shows that as goods were supplied, the value of such goods

was to be taken in discharge *pro tanto* of the advance represented by the note, and that goods were accordingly supplied.

I think, therefore, that the note ought to be treated as having been over-due at the date of endorsement; and then the extent of the obligation on the note, as between Gunny and defendant, would depend on the value of goods short supplied by defendant within the amount due on the advance. If, therefore, as defendant asserts, and his account shows, the account had turned against Gunny, and the note was an acknowledgment of an amount which was, in fact, no longer due, it would be a fraud in Gunny to negotiate the note, and the endorsee taking it over-due stands in the place of Gunny as regards the right of defendant to restrict the obligation on the note to the amount due, if any, on the account. I would, therefore, reverse the decree and direct the taking of the account.

KERNAN, J.—My view of this appeal is, that it should be allowed, and, if the plaintiff so desires, an account should be taken between the defendant and M. S. Gunny Saib, of their dealings, and that the bill should only be a security in plaintiff's hands for any debt, if any, due by the defendant to Gunny Saib.

The bill I look upon as being received by the plaintiff, after it was over-due, and, therefore, it is

in plaintiff's hands subject to the equities between defendant and Gunny Saib—that is as to the result of the accounts.

The following facts appear to me to be established beyond doubt. That Gunny wished to purchase goods from defendant, and the latter required an advance, before he would supply, and it was agreed that defendant should pay interest on the advance which, however, was to be put to the credit of the goods when sold. Then it was agreed that the note now sued on was to be given to represent that advance, and accordingly the advance was made to defendant on the 10th day of September 1869, and note given payable on demand, and dated that day. The learned Judge below appears to have believed that the note was so given to represent the advance, and that the advance was to be put to credit of the goods.

If Gunny Saib's evidence, as printed, means, at line 266, "gave note for advance on account of goods, and it is entered in accounts," and again at line 277, "The 4,500 is entered on Moideen's accounts. I saw that entry, never saw other entries," then the agreement is clear, as the defendant and Gunny both agree on that point. But if Gunny's evidence does not contain an admission of the agreement, see the concurrence of undoubted facts going to establish it.

1. The dealings commenced in

September 1869 (not the supply of goods however).

2. The advance and note are of that date.

3. Interest was *paid* in cash on the note, until the supply of goods by defendant was begun, and no interest was paid after the first supply.

4. Defendant's accounts are filed with his statement, and in these accounts, the 4,500 is credited to Gunny at the date of the advances, also the interest to the date of the first supply of goods, and the goods supplied are entered apparently in correct order.

These books are not impeached in any way, and though Gunny said he kept books, in which the note is entered, and Gunny disputes defendant's accounts, yet Gunny's books are not produced.

Plaintiff was quite aware from the defence filed that one main question in the case made by the defendant was, that the note was by the agreement of Gunny and defendant to be taken into the account of the goods; and yet the books of Gunny, so important, are not produced.

I am, therefore, quite satisfied that by the agreement between Gunny and the defendant, the note and the consideration for it were to be taken into the accounts of goods, and that the agreement was that, if on the taking of the accounts, and crediting the 4,500, nothing should be due to Gunny, or a less

sum than the amount of it, the liability on the bill was to be governed by the result.

This was an equity attaching to the bill itself, as between the original parties, and *not a collateral matter*, such as a set-off, and any endorsee of this note taking it, when over-due, took it subject to the equities, even though he gives full value for it—*Cullinridge, v. Farquharson*, 1, Stark, 259; *Sturtevant, v. Ford*, 4, Man. and G., 101; *Holmes, v. Kidd*, 3, H. and N., Exr. Cham., 891; and *Burrough, v. Moss*, 10, B. and C., 558.

The question then is was this note over-due when plaintiff took it.

It is a note payable on *demand* without any mention of interest, and is capable of being sued on, at once, without demand made, and the Statute of Limitation runs from its date—*Norton, v. Ellam*, 2, M. and W., 461.

No doubt this note was intended as a continuing security by the parties (though not so expressed on the face of it), and so comes within the principle that such a note is not to be considered over-due, until payment has been demanded. *Borough, v. White*, 4, B. and C., 327; *Brooks, v. Mitchell*, 9, M. and W., 15.

In *Borough, v. White*, an endorser sued on the note, *no demand* was proved before endorsement, and it was held, *therefore*, that the note could not be treated as over-due.

In *Brooks, v. Mitchell*, likewise

a note on demand was endorsed, and in the hands of the endorser, but no evidence was given of demand before endorsement; and it was held, *therefore*, not to have been over-due, when the endorsee took it.

In *Craffs, v. Davis*, 9, M. and W., 15, there was no proof of *demand* before endorsement.

I take it, therefore, that a demand of payment of a note payable on demand and non-payment make such note thereafter over-due. It has not been held in any case cited, or that I am aware of, that notice of such demand must have been communicated to the endorsee before, or at the time of, endorsement in order to place him in the position of taking or holding it over-due.

In *Brockman, v. Caddy*, 4, A. and E., 275 (1838,) Lord Denman said that "it *usually* appeared on the face of the note that it was over-due," and Patteson put the question, surely the plaintiff must be fixed with the knowledge that the note had been presented, so as to be over-due. But there was no discussion on the point in that case, and the dictum or query by Patteson was but *obiter dictum* which has never been adopted or followed, and a marked difference is to be observed in the language used by Lord Denman and Patteson, J.

Then assuming that my view of the law on this point is right, the further question is whether the

note was over-due before the endorsement to the plaintiff. On this point, Gunny states that he asked Moideen for the money often. This is clear evidence of a demand of the note; and again Gunny says he endorsed the note over as he wanted money. Is not the inference from this statement clear that he had demanded the amount, and that, as defendant did not pay it, Gunny transferred it, and if this is to be believed, the note was clearly over-due when plaintiff took it. I have no doubt upon the evidence that the note was on the evidence of the plaintiff over-due, at the date of the endorsement. Upon this view, I would allow the appeal and modify the decree as above stated.

But the defendant alleged that plaintiff had actual notice that Gunny and defendant had dealings together, and that the note and the amount of it had been brought into the accounts between them, and that plaintiff was present at a settlement of accounts between them, in which a balance of about 2,000 was found due to defendant by Gunny, who then and there promised in plaintiff's presence to give up the note to defendant. If I had heard the case originally, I should probably have, upon the evidence, as it appears reported, found for the defendant. For although the plaintiff and Gunny deny the settlement, and though no settlement has been signed by Gunny, yet the accounts of the defendant, which appear cor-

rectly kept, are produced, and support the allegation that the balance was due to defendant of 2,000 odd at the date when the dealings ended; and no accounts of Gunny of the dealings with defendant are produced, though he says he has them, and that the amount of the note is not brought into them, and though the balance in them is against defendant, and plaintiff was aware of the importance of producing them. Moreover, a settlement of accounts at which plaintiff was present, though not stated to have taken an active part in them, and though Gunny's book or accounts were not produced, is proved by four different persons, apparently independent of plaintiff. These persons did not, as far as I can see, give their evidence with such a degree of particularity, as to dates or sums as to give the idea that the evidence was concocted. Then Keshava Pillay (in defendant's employ no doubt) proved defendant's accounts, showing an exact balance due to defendant, and these accounts were brought into Court on the 4th November 1872, and don't bear any appearance of fabrication. Again, Gunny says a balance was due to him, and he did not sue for two years, though he wanted money. However, I am not prepared to say that the learned Judge is wrong in the conclusion he came to, viz., that there was not any settlement of accounts, and that plaintiff had not any actual notice before he be-

came endorsee, that the amount of the note was brought into the account, and a balance found due to defendant, and that plaintiff had promised to return the note to the defendant.

There still remains the question whether plaintiff is a mere name-lender, suing for the benefit of Gunny. On this question I entertain an extremely strong opinion, in the affirmative. The evidence tends, I think, to lead irresistibly to that conclusion. It appears that the note should be barred by the Statute of Limitations, on the 11th September 1872, and that plaintiff became endorsee thereof in August 1872, upon a contract between him and Gunny, whereby the latter *sold* the bill, and as he says in his evidence, "I remained indifferent, as I sold the note," that is, the plaintiff agreed not to look to Gunny for payment, and plaintiff taking the responsibility of defendant above, gives for the note not only the full principal amount of the note, but also all arrears of interest at 15 *per cent.* for two and a half years or so, less 450 *Rupees*. This appears to me simply incredible. It does not appear that plaintiff had any special knowledge of the circumstances or solvency of defendant. On the contrary, the note was for two and a half years and upwards unpaid, *with interest* at 15 per cent. Yet plaintiff does not take the responsibility of the endorser, Gunny; plaintiff says

that defendant told him two months before that he gave the note and would pay in ten months, and there was conversation about getting 1,000 *Rupees* taken off the note. *I doubt this*, but even so, it is clear notice to plaintiff that defendant was pressed, and I cannot believe that plaintiff ever gave the money for the note *bond fide*. I believe he is a mere name-lender, and in this view I would also modify the decree as above.

CALCUTTA HIGH COURT.

The 19th September, 1873.

THE HONORABLE J. B. PHEAR and
G. G. MORRIS, *Judges.*

NOWAB KHAN (*Plaintiff*) *Appellant,*
versus

RUGHONATH DOSS and others (*Defendants*) *Respondents.*

*Improper Admission of Evidence—
Improper way of treating Evidence.*

It is incumbent upon the Lower Appellate Court, under the provisions of the Civil Procedure Code, to state distinctly the reasons for sending for evidence in the appellate stage of a case.

It is exceedingly dangerous for the Judge of an Appellate Court to come to the conclusion that a document is fabricated merely because it presents an appearance which in his judgment an authentic and real document would not be likely to have under the circumstances.*

PHEAR J.—(In delivering judgment said.) Then, it further appears

* Vide a similar decision in the "Legal Companion," Vol. II., Civil Rulings, p. 14, column 2.

from his judgment that he sent for and gave consideration to some documents which were not put in evidence before the first Court. He has not given any reason for this step ; and from the remarks which he makes with regard to the nature of the evidence afforded by these documents, it hardly appears that it is directly relevant to the issue which he had to try. At any rate, it was incumbent upon him, under the provisions of the Civil Procedure Code, to state distinctly the reasons which caused him to send for this evidence in the appellate stage of the case. Inasmuch as he has not done so, we have no means of judging whether this evidence was properly receivable at that stage or not ; and we have no other alternative but to direct that it be rejected and excluded from the evidence on the record.

* * * * *

A still more unfortunate error has been fallen into by the Subordinate Judge with regard to the pottahs and the receipts. He says :—"The pottahs of their cultivation (that is, the cultivations of certain witnesses) which they have filed clearly seem on the very sight to be fabricated ; inasmuch as the reverse of the pottah, which is always handled by every one, looks clear, and the side which contains the writing, and which it is possible to keep clean, looks old and dirty. By my own

experience I do not at all hesitate to call this pottah a fabrication. Similar is the case of the dakhilahs. In short, I have no reliance upon the evidence of these witnesses."

It seems to us that this is not the proper way of treating evidence of this kind. Witnesses had sworn to the authenticity of these documents, and the Subordinate Judge ought not, simply from an inspection of them and in reliance upon his own experience in judging of such documents, to have come to the conclusion that they were fabrications, and that consequently the witnesses whose evidence made them out to be authentic documents had perjured themselves. Before coming to a conclusion which involved an accusation of such a serious character as this, the Judge ought to have looked very carefully indeed into the testimony of those persons, compared it so far as he was able with the other evidence in the case, and to have judged in that way whether the witnesses were such as could not be relied upon. It is exceedingly dangerous for the Judge of an Appellate Court to come to the conclusion that a document is fabricated merely because it presents an appearance which in his judgment an authentic and real document would not be likely to have under the circumstances.

+ Second Subordinate Judge of Bhaugulpore.

Religious Endowment—Sale by Mohunt—Vendor's title.

The plaintiff's vendor was not the owner of the land: he was the Mohunt for the time being in charge of the endowment, and had only a life-interest in the property. In that event he could not create a title superior to his own, or, except under most extraordinary pressure and for the distinct benefit of the endowment, bind his successors in office. A purchaser from the mohunt of an endowment of the kind alleged in this case would only take an interest commensurate with the mohunt's life; and if he retained possession after the mohunt's death, the successor to the guddee would have a cause of action against him from the date of the election. If this were not so, any mohunt who was inclined to commit waste on an endowment, and who lived long enough, might ruin the property entrusted to his charge, and leave his successor remediless, if more than 12 years had elapsed since the alienations.—C. H. C. (Glover and Morris, J. J.)—18th September 1873—Mohunt Barm Suroop Doss—XX., W. R., p. 471.

Setting aside evidence on mere suspicion—Bequest void for want of certainty.

It has been said on more than one occasion by the judicial committee of the Privy Council that it is not right to set aside the evidence of witnesses, against whose truthfulness nothing is shown, merely on

suspicion,—upon an opinion of the Court that the transaction was a probable one.

Where a will gave the testator's widow permission to adopt and made provision for the adopted son entering into possession after her death, providing further that if the adopted son died unmarried, the estate should pass to the testator's nearest *sapinda gyanti*: Held that the gift or bequest was, according to the doctrine laid down by the Privy Council in the case of Tagore, *vs.* Tagore, void and of none effect because the nearest *sapinda* was a person who might not be in existence at the death of the testator, being one who could not be ascertained at that time.—C. H. C. (Couch, C. J., and Glover, J.)—19th September 1873.—Ramgutte Acharjea—XX., W. R., p. 472.

Decree—Interest—Execution.

Where a decree contains no order for interest, the Court executing it has no power to give interest: nor can such a decree be reformed by means of a miscellaneous appeal.—C. H. C. (Phear and Morris, J. J.)—19th September 1873.—Jewun Lal Mahtah—XX., W. R., p. 477.

Act XXXV. of 1858—Lunatic—Appointment of Manager.

It is only when a man has been adjudged a lunatic as the result of proceedings and an enquiry held in due course of law, that the Court obtains the authority to appoint a

manager of his estate.—C. H. C. (Phear and Morris, J. J.)—19th September 1873—Mussamut Gireejabuttu Kooree—XX., W. R., p. 477.

Act XXIII. of 1861, Sec. 27—Special appeal—Application under Section 15 of the Charter Act.

A special appeal having been successfully objected to under Act XXIII. of 1861, Sec. 27, the Court refused to treat the petition of appeal as if it were an application to the Court to exercise its extraordinary powers, but simply rejected the appeal without prejudice to appellant's right to make an application in proper form to have the Judge's order quashed as having been made without jurisdiction.—C. H. C. (Phear and Morris, J. J.)—20th September 1873—Soonut Doss—XX., W. R., p. 478.

Enhancement of Rent—Separate Notices.

A notice of enhancement of rent need not be on a separate piece of paper for each holding. All that is required is that it shall be so distinct for each that the tenant may be able to distinguish those in respect of which he does not object to the enhanced rate from others in respect of which he declines to pay it.—C. H. C. (Couch, C. J. and Glover, J.)—17th November 1873—J. D. McGiveron—XX., W. R., p. 479.

Right of Occupancy—Transfer.

Is a bare right of occupancy under the rent law transferable

irrespective of the will of the zemindar.—XX., W. R., p. 478.

Former admissions rendered nugatory by subsequent occurrences.

In a suit for a share of certain property where the defence was rested upon a Mukurree deed under which the defendants alleged that their predecessor and themselves had had possession, the Lower Appellate Court gave effect to certain supposed admissions without noticing matters which had been noticed in the judgment of the first Court as having occurred subsequently to the admissions and rendered them nugatory : held, that the Lower Appellate Court's decision was erroneous and ought to be reversed.—C. H. C. (Couch, C. J. and Glover, J.)—17th November 1873—Lutchoomun Lall—XX., W. R., p. 480.

Permission to bring a fresh suit, under Sec. 97, Act VIII. of 1859, not recorded through inadvertence—Review.

A plaintiff having, under Act VIII. of 1859, Section 97, asked leave to withdraw his suit with permission to bring a fresh suit, the Moonsiff granted the prayer ; but the permission to bring a fresh suit was, through inadvertence, not recorded on the petition. Subsequently the Moonsiff made an order giving plaintiff this permission : *Held*, that there was nothing to prevent the passing of such an order, which was in the nature of a review of the original order, and

that it was the Moonsiff's intention to give the permission, which intention had not been expressed through inadvertence.—C. H. C. (Glover, J.)—27th Aug. 1873—Pearee Mohun Dutt—XX., W. R., p. 401.

Appeals from *ex parte* decisions—Declaratory suit.

Held (in concurrence with the decisions at p. 450, X., W. R., and p. 161, VI., Bombay Reports; and differing from that in p. 109, III., Madras Reports), that a special appeal lies from an *ex parte* decision passed by an Appellate Court in regular appeal.

Where there has been a clear dispute as to title, a suit for declaration of title is maintainable whether plaintiffs have been disturbed or not in their possession.—C. H. C. (Markby and Birch, J. J.)—28th August 1873.—Paran Chunder Ghose—XX., W. R., p. 402.

Appellate Court—Grounds of Decision—Remands.

It is the duty of the Appellate Court, when it reverses the decision of the first Court, and more especially when the judgment of the first Court is full and cogent, to point out the grounds on which it comes to a different conclusion. Where a District Judge had omitted to do so, and having left the country could not be required to supply the omission, the High Court being unable to make the ordinary presumption that he had fully considered the evidence, set

aside the judgment, and remanded the case to be heard *de novo*.—C. H. C. (Markby and Birch, J. J.)—29th Aug. 1873—Kristo Chunder Chuokerbutty—XX., W. R., p. 403.

Enhancement of Rent—Form of Notice—Specification of Holdings.

A notice of enhancement ought to state distinctly the several holdings the rent of which is sought to be enhanced, the amount of enhanced rent that the tenant is liable to pay for each, and the grounds of the claim in each instance. If a suit for enhancement is decreed where the notice, though embracing several holdings, was not in that form, the defendant is entitled to have specified what the enhanced rent for each holding is, so that he may be able to relinquish any one of them and retain the others.—C. H. C. (Couch, C. J. and Glover, J.)—1st September 1873—Dwarkanath Haldar—XX., W. R., p. 404.

Sale of a Decree—Auction-purchaser—Assignee—Lien.

Where the rights and interests of decree-holders in a decree are sold in execution, the party purchasing *bond fide* without any knowledge of a previous assignment of those rights and interests, is entitled to the proceeds of the purchased decree free from any trust or obligation in favour of the assignees.—C. H. C. (Phear and Morris, J. J.)—1st September, 1873.—Nunhuk Sahoo—XX., W. R., p. 408.

Assignee—Execution Judgment-debtor's remedy.

The assignee of a decree having obtained execution of it in the Deputy Collector's Court under cover of a declaratory and mandatory decree of the Civil Court, which latter decree was set aside in appeal, a suit was brought against the assignee to recover the money which he had obtained by means of the execution proceedings: *Held* that the judgment-debtor or his representative (plaintiff) had no title to recover the money, unless he could show that he had been in some way defrauded by the transaction; the proceeding of the Deputy Collector giving him no cause of action by the mere fact of having been *ultra vires*, or not done in full exercise of judicial discretion—C. H. C. (Phear & Morris, J. J.)—1st Sept. 1873—Ramgobind Singh—XX., W. R., p. 406.

Set-off—Cross-suit—Act VIII. of 1859 Secs. 195 and 121.

Where a defendant claims a right of set-off arising out of one and the same transaction as that in which the suit originated, it is not equitable to drive him to a cross-suit; a decree under Act VIII. of 1859 Sec. 195 and the latter portion of Sec. 121, being of the same effect and subject to the same rules as if it had been made in a separate suit.—C. H. C. (Kemp and Glover, J. J.)—2nd September, 1873—Rudra Ram Deb—XX., W. R., p. 410.

Purchase by Putneedar of Zemindaree shares—Liability for Rent—Set-off.

The four defendants obtained jointly a putnee lease of Lot R., and subsequently purchased, jointly 5 annas share in the Zemindaree. Again defendants 1 and 2 separated from 3 and 4, each taking 8 annas of the putnee and $2\frac{1}{2}$ annas of the Zemindaree; and then defendants 3 and 4 sold their Zemindaree right in 2 annas and 15 gundas share to K., the plaintiff, retaining 5 gundas share on their own account. Plaintiff sues to recover the rent of 2 annas and 15 gundas from defendants 1 and 2, who deny plaintiffs' claim, while they admit that they are liable for 8 annas rent of the putnee, treating themselves as their own Zemindars for $2\frac{1}{2}$ annas share in the Zemindaree, and they allege payment of $5\frac{1}{2}$ annas of the putnee rent to the 8 annas shareholder in the Zemindaree, and a set-off against the other $2\frac{1}{2}$ annas against their own claim as Zemindars.

Held that as defendants 1 and 2 were strangers to the transfer of the rights of defendants 3 and 4 to the plaintiff, they have, as between themselves and the plaintiff, a right still to do what they did formerly, namely, set-off their putnee liability against their Zemindaree right.—C. H. C. (Markby and Birch, J. J.) 2d September 1873—Gooroo Dyal Chuckerbutty—XX., W. R., p. 409.

CALCUTTA HIGH COURT.

*The 24th October, 1873.*THE HON'BLE A. G. MACPHERSON
and G. G. MORRIS, *Judges.*THE QUEEN, *vs.* NOBIN CHUNDER
BANERJEE.*Disagreement between Judge and
Jury—Reference to High Court
—Act X. of 1872, Sec. 263—Act
XLV. of 1860, Sec. 84.*

Unless the verdict of a Jury is clearly and patently wrong and unsustainable on the evidence, it should not be set aside.

The fact of unsoundness of mind is one which must be clearly and distinctly proved, before any Jury is justified in returning a verdict under Section 84 of the Penal Code.

MACPHERSON, J.—The Jury in this case have found that the prisoner caused the death of his wife, but that he is not guilty of murder, because when he killed her he, by reason of unsoundness of mind, was incapable of knowing that he was doing an act which was wrong or contrary to law. The Sessions Judge, disagreeing with the verdict of the Jury as regards the unsoundness of the prisoner's mind, was of opinion that he ought to have been convicted of murder, and he has (under Section 263 of the Criminal Procedure Code) submitted the case to the High Court, considering it necessary for the ends of justice to do so. It thus becomes necessary for us to deal with the case submitted to us as with an appeal, which we read as meaning an appeal by the prosecution: and by the provisions of Section 263, we have au-

thority to convict the accused on the facts, and to pass sentence accordingly.

In the "grounds" recorded by the Judge, as required by section 464, he says that in his opinion the verdict is opposed to the evidence on the record; that the accused was not of unsound mind; and that he committed the offence of murder.

There is really but one question before us,—that as to the state of the prisoner's mind at the time he caused his wife's death. That he did cause her death cannot be seriously doubted. The Jury have found as a fact that he did, and the Sessions Judge agrees with them as to this. And that this finding is correct is, we think, conclusively shewn by the evidence.

The learned counsel for the prisoner has contended that as, under Section 257 of the Criminal Procedure Code, it is the duty of the Jury (as distinguished from the duty of the Judge) to decide which view of the facts is true, this Court cannot disturb, or at any rate ought not to disturb, the verdict of the Jury, if there is on the record any evidence whatever in support of it. But Section 257 must be read as qualified by Section 263, the effect of which is that, if the Judge disagrees with the Jury and submits the case to the High Court, the whole matter is opened up,—the High Court must treat the case as before it on appeal, may convict the accused person on the facts, and

if it does convict him, shall pass the proper sentence upon him. We quite agree, however, that the powers given to this Court by Section 263 are not to be lightly exercised, and that the unanimous verdict of a Jury ought not to be set aside, even if the Sessions Judge disagrees with it, unless that verdict is clearly and patently wrong and unsustainable on the evidence. If there were any substantial doubt in this case, we should certainly not disturb the verdict. It appears to us, however, that there can be no reasonable doubt about the matter.

Without saying that there is on the record absolutely nothing which could be said to afford some evidence of unsoundness of mind, we have no hesitation in saying that there is scarcely any such evidence, and that such as it is, it is wholly unreliable and worthless for the particular purpose of proving insanity.

Witnesses speak of the intensity of the prisoner's rage and grief when he heard of his wife's alleged infidelity a day or two before the murder, of his rolling on the ground in his passion, of his eyes being red or blood-shot, and of his skin being hot. They also tell how, when he had struck down his wife, he came out of the house, calling aloud that he had killed her, and voluntarily giving himself up to a chowkeedar that he might be dealt with according to law for what he had done. These points are relied on as shew-

ing insanity. It may be that if there had been substantial evidence of the prisoner's unsoundness of mind, these facts, or some of them might have been deemed to be corroborative of it. But in themselves these facts, whether taken singly or together, are no real evidence of unsoundness of mind, for there is not one of them which might not in the natural course of events have been found to exist in the case of a man who was perfectly sane, but was laboring under the influence of great grief and passion.

It is not because a man commits a very horrible murder, or because he commits it while laboring under strong passions and feelings, that therefore the world is to assume that he must have been insane when he committed the deed. The fact of unsoundness of mind is one which must be clearly and distinctly proved, before any Jury is justified in returning a verdict under Section 84 of the Penal Code. Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved.

Here it is not attempted to be proved that, prior to this occurrence, the prisoner ever at any time shewed any symptoms of insanity. It is not even suggested that the prisoner was of unsound mind until he heard the reports which caused him two days afterwards to take his wife's life. Nor is it alleged that he was of unsound mind subse-

quently, at the time he was tried, or at any other time. And not a single medical witness, nor even the Jailor who has had him in custody since the murder (which took place in the end of May), has been called to speak as to the prisoner's mind being unsound. The case proved is simply that the prisoner, who was employed in a Government Printing Press in Calcutta, and up to that time was of sound mind, went from Calcutta on the 24th of May to visit his wife, who was living in her father's house; that almost immediately after reaching his father-in-law's house, he became aware of certain rumours as to his wife's infidelity; that he (and apparently not without cause) believed these rumours to be true, and considered that her father was very much to blame in the matter; that he was passionately angry and greatly grieved at what he heard, and removed his wife from her father's house to that of an aunt (*didi-ma*), who lived close by; that he resolved to bring his wife away with him back to Calcutta, but was afraid (and very likely with good reason) that he would be prevented from doing so by those who had led his wife astray; that he took his wife back to her father's house on the 27th, saying that on the next day he would take her to Calcutta; that the same evening, seizing the opportunity of his being in the house alone with his wife, he murdered her; and

that, having murdered her, he ran out of the house crying aloud that he had done so, and went and delivered himself up to a chowkeedar, saying he had killed his wife and he might deal with him as the law directed.

The prisoner has confessed the whole matter at length before the Deputy Magistrate, and subsequently before the Magistrate. And the statements made by him are borne out in all substantial respects by the evidence of the witnesses who have been examined. It is clear that the murder was committed owing to the unhappy position in which the prisoner considered his wife and himself to be placed. He did the deed under the influence of anger, jealousy, and grief. No doubt any person placed in the position in which he was, or believed himself to be placed, is much to be commiserated. But there is absolutely nothing on the facts before us from which any reasonable person can conclude that the prisoner was "incapable of knowing the nature of the act," or that he was incapable of knowing that he was doing what was wrong or contrary to law. On the contrary, all the evidence shows that he knew the nature of the act perfectly well, and knew that it was wrong and that it was contrary to law.

On the whole, we think the verdict of the Jury so utterly wrong, and so entirely against the evidence, that we consider that the Judge

acted rightly in submitting the case under Section 263 ; and that it is our duty to convict the prisoner on the facts.

We find that the prisoner has committed culpable homicide amounting to murder ; and we sentence him (under Section 302 of the Penal Code) to transportation for life.

CALCUTTA HIGH COURT.

The 13th September, 1873.

THE HON'BLE F. A. GLOVER and
E. G. BIRCH, *Judges.*

SIRIAM CHUNDER HALDER, *Petr.*,
versus

THE CHAIRMAN OF THE HOWRAH
MUNICIPALITY.

Making Bricks—License—Act III.
(B. C.) of 1864, Sec. 77.

Section 77 of Act III. B. C. of 1864 refers to the burning of bricks for trading purposes, and not to cases where bricks are made for the particular use of the person burning them. There is nothing in that Section which makes it an offence to make bricks without first taking out a licence.

GLOVER, J.—We think that this rule must be made absolute. The Junior Government Pleader, who has appeared on behalf of the Chairman of the Municipality, says that no one is permitted to make bricks whether for his own sake or for sale without first taking out a license. The only section of Act III. (B. C.) of 1864 which could be applied to this case refers to

making bricks, or doing other things with reference to trade. There is nothing in the Section which applies to a person making bricks for his own use, or which makes it an offence against the Municipal Regulations so to make them, without first taking out a licence. Now the petitioner's affidavit is to the effect that those bricks were used for his own purposes, and that before commencing to make them he got the permission of the Chairman to excavate ground for the purpose. The permission is filed, is signed by the Secretary to the Municipality, and is stated to have been given in the terms of the order ; and in that document the petitioner has permission given him to burn bricks for his own use. How after giving this permission (and there is an affidavit to the effect that the bricks when made were only employed by the petitioner for his own use,) the Chairman, or rather the Municipal Commissioners acting under the orders of the Chairman, could have fined the petitioner for burning bricks without a license under Section 77 of the Act, is not easy to see. That Section, as I have said, refers to the burning of bricks for trading purposes, and not to cases where bricks are made for the particular use of the person burning them. It appears to us that this fine has been improperly levied on the petitioner, and that it should be returned to him.

High Court of Judicature at Fort William in Bengal.

NOTIFICATION.

THE following rules made by the High Court of Judicature at Fort William in Bengal, pursuant to section 20, clauses 1, 2 and 3, of the Court Fees Act, 1870, having been confirmed by the Lieutenant-Governor of Bengal, and sanctioned by the Governor-General of India in Council, are now published.

HIGH COURT, the 23rd February 1874.

H. J. S. COTTON, Offg. Registrar.

Rules framed by the High Court of Judicature at Fort William in Bengal in accordance with Clause 1, Section 20 of the Court Fees Act of 1870 declaring the Fees Chargeable for Serving and Executing Processes issued by the High Court in its Appellate Jurisdiction, and by the other Civil and Revenue Courts established within the limits of such Jurisdiction.

RULE 1.—The fees exhibited in the following table shall be charged for serving and executing the several processes against which they are respectively ranged :—

TABLE OF FEES.

PART I.—In the High Court, Appellate Jurisdiction.

	Proper Fee. Rs. A. P.
<i>Article 1.</i> —Every summons, subpoena, rule, notice, proclamation, injunction, or other order not elsewhere specified in this table, Part I. 	3 0 0
<i>Article 2.</i> —Every commission to make a local investigation or to take evidence, or for any other purpose—	
(a) in respect of the commission 	3 0 0
(b) in respect of the remuneration of the Commissioner, i. e., person who is to execute the commission, <i>per diem</i>	Such sum as the Court may direct.

Note.—A sum sufficient to cover the daily fee (b) for such period as may be fixed by the Court for the purpose of executing the commission must be paid in addition to the fee (a) at the time when the commission is issued ; and, if the commission is not completely executed within the period so fixed, a further sum, sufficient to cover the daily fee (b) for the excess period extending from the end of that fixed period up to, and inclusive of, the date of the complete execution of the commission, must be paid before the Commissioner's report or other return to the commission is used.

Article 3.—Every warrant for arrest of the person ... Rs. A. P.
3 0 0

PART II.—In the Courts of Judges and Subordinate Judges, and in the Revenue Courts when the suit in the Revenue Courts in which the process is issued is valued at a sum exceeding Rs. 1,000—

Article 1.—Every summons, subpoena, notice, proclamation, injunction, or other order not elsewhere specified in this Table, Part II.... Rs. A. P.
2 0 0

Article 2.—Every commission to make a local investigation or to take evidence, or for any other purpose—
(a) in respect of the commission ... 2 0 0
(b) in respect of the remuneration of the Commissioner, *i. e.*, person who is to execute the commission, *per diem* ... 3 0 0

Note.—A sum sufficient to cover the daily fee (b) for such period as may be fixed by the Court for the purpose of executing the commission must be paid in addition to the fee (a) at the time when the commission is issued; and, if the commission is not completely executed within the period so fixed, a further sum, sufficient to cover the daily fee (b) for the excess period extending from the end of that fixed period up to, and inclusive of, the date of the complete execution of the commission, must be paid before the Commissioner's report or other return to the commission is used.

Article 3.—Every process of attachment of property by notice or proclamation .. Rs. A. P.
2 0 0

Article 4.—Every process of attachment of property by actual seizure—
(c) in respect of the warrant of attachment ... 2 0 0
(d) in respect of each man, necessary to ensure safe custody, who is left in possession, *per diem* ... 0 6 0

Note.—A sum sufficient to cover the daily fee (d) for a period of at least one month must be paid in addition to the fee (c) at the time when the process is obtained; and, if the attachment is continued beyond the month, a further like sum for the next month must be paid two clear days before the expiration of the month which has been already paid for, and so on for each ensuing month, otherwise the man or men in possession will be removed.

Article 5.—Every process of attachment by the arrest of the person ... Rs. A. P.
15 0 0

Article 6.—Every order for the sale of property—
(e) in respect of the order of sale 2 0 0
(f) by way of poundage on the gross amount realized by the sale up to Rs. 1,000 ... 2 per cent.
together with a further fee on all excess of gross proceeds beyond Rs. 1,000 of ... 1 per cent.

Note.—The portion (e) of this fee must be paid when the process is obtained, and the poundage (f) must be paid at the time of making the application for payment of the proceeds of sale out of Court, as hereinafter provided.

PART III.—In the Courts of Moonsiffs and of Small Causes, and in the Revenue Courts, when Part II. does not apply—

Rs. A. P.

Article 1.—Every summons, subpoena, notice, proclamation, injunction or other order not elsewhere specified in this Table, Part III. ... 1 0 0

Article 2.—Every commission to make a local investigation, or to take evidence, or for any other purpose—
 (a) in respect of the commission ... 1 0 0
 (b) in respect of the remuneration of the Commissioner, i. e., person who is to execute the commission, *per diem* ... 3 0 0

Note.—A sum sufficient to cover the daily fee (b) for such period as may be fixed by the Court for the purpose of executing the commission must be paid in addition to the fee (a) at the time when the commission is issued; and if the commission is not completely executed within the period so fixed, a further sum sufficient to cover the daily fee (b) for the excess period, extending from the end of that fixed period up to, and inclusive of, the date of the complete execution of the commission, must be paid before the Commissioner's report or other return to the commission is used.

Rs. A. P.

Article 3.—Every process of attachment of property by notice or proclamation ... 1 0 0

Article 4.—Every process of attachment of property by actual seizure—
 (c) in respect of the warrant of attachment 1 0 0
 (d) in respect of each man, necessary to ensure safe custody, who is left in possession, *per diem* ... 0 4 0

Note.—A sum sufficient to cover the daily fee (d) for a period of at least one month must be paid in addition to the fee (c) at the time when the process is obtained; and if the attachment is continued beyond the month, a further like sum for the next month must be paid two clear days before the expiration of the month which has been already paid for, and so on for each ensuing month, otherwise the man or men in possession will be removed.

Article 5.—Every process of attachment by the arrest of the person ... 5 0 0

Article 6.—Every order for the sale of property—
 (e) in respect of the order of sale ... 1 0 0
 (f) by way of poundage on the gross amount realized by the sale up to Rs. 1,000 ... 2 per cent.
 together with a further fee on all excess of gross proceeds beyond Rs. 1,000 of ... 1 per cent.

Note.—The portion (*e*) of this fee must be paid when the process is obtained, and the poundage (*f*) at the time of making the application for payment of the proceeds of sale out of Court, as hereinafter provided.

RULE II.—Notwithstanding Rule I., no fee shall be chargeable for serving and executing any process, such as a notice, rule, summons or warrant of arrest, which may be issued by any Court of its own motion, solely for the purpose of taking cognizance of, and punishing any act done, or words spoken, in contempt of its authority.

RULE III.—No process which comes within the operation of Rule I. shall be drawn up for service or execution, except upon an application made to the Court for that purpose in writing on a document bearing upon its face stamps not less in amount than the fee which by Rule I. is directed to be charged for serving and executing the process so sought to be drawn up. This application may, however, at the option of the party making it, be included in the petition by which he moves the Court to order the process to issue, but in that case the petition must bear the requisite stamps for the process fee in addition to such stamps, if any, as are needed for its own validity; and, in either case, the filing of the application thus duly stamped shall constitute payment of the fee chargeable for the process.

RULE IV.—In cases which are covered by the note to Article 2 of Part I, and the note to Articles (2) and (4) of Parts II; and III. of the Table of Fees in Rule I., the additional fee which may become payable after the process has been actually issued shall be paid by filing a written requisition to the Court to receive the fee, which document shall bear on the face of it stamps not less in amount than the additional fee, together with a memorandum of the purpose for which it is paid.

RULE V.—The proceeds of a sale effected in execution of any decree will only be paid out of Court on an application made for that purpose in writing, and the additional fee (*f*), Article (6), Parts II. and III., must be paid by stamps affixed to, or impressed upon, the first of such applications: whether it be or be not made by the person who obtained the order for sale, or whether it does or does not extend to the whole of the proceeds. No fee will be chargeable upon any such application subsequent to the first.

N. B.—The fees paid in pursuance of these Rules must in all proceedings be deemed and treated as part of the necessary and proper costs of the party who pays them.

R. COUCH.	F. A. GLOVER.
F. B. KEMP.	CHARLES PONTIFEX.
LOUIS S. JACKSON.	W. AINSLIE.
J. B. PHEAR.	E. G. BIRCH.
A. G. MACPHERSON.	G. G. MORRIS.
W. MARKBY.	

Rules framed by the High Court of Judicature at Fort William in Bengal in accordance with Clause II., Section 20, of the Court Fees' Act, 1870, declaring the Fees chargeable for Service and Execution of the several Processes in the Courts of Magistrates.

I.—The fees hereinafter mentioned shall be chargeable for serving and executing the process to which the fees are respectively attached, viz:—

		Rs.	A.	P.
(1)	Warrant of arrest ...	For the warrant in respect of one person ...	0	0
		In respect of every additional person named therein ...	4	0
(2)	Summons	For the summons in respect of one person or of the first two persons residing in the same place ...	0	8 0
		In respect of every additional person named therein ...	0	0
(3)	Proclamation for absconding party under Section 171, C. Cr. Procedure ..	For the proclamation	2	0 0
(4)	Proclamation for witness not attending, Section 353 ...	For the proclamation	1	0 0
(5)	Warrant of attachment	For the warrant	1	0 0
		Where it is necessary to place Officers in charge of property attached, for each Officer so employed, per diem ...	0	4 0
(6)	Warrant of levy of fine or of maintenance to wife, children, &c.	For the warrant ...	1	0 0

and a percentage on the amount of fine or maintenance levied, viz., 2 per cent. on sums not exceeding Rs. 100; and where the sum exceeds Rs. 100, then 2 per cent. on Rs. 100, and 1 per cent. on the amount of excess.

(7) Written order	For the order	1 0 0
(8) Injunction ...	For the injunction	1 0 0
(9) Notice ...	For the notice	1 0 0

II.—Nothing herein contained shall be deemed to authorize the levying of any fee for any summons to attend as a juror or assessor in a Court of Session, and no fee shall be chargeable on any such summons.

III.—No fee shall be chargeable in advance on any process of a Criminal Court in any case where the prosecution is on the part of Government, but it shall be competent to any Magistrate in such case, if the accused is convicted, to order that such fees shall be paid by the accused, or any of them, in like manner as if such fees had been paid by the prosecutor in the first instance.

IV.—Where any percentage is directed by these rules to be taken upon amounts levied as fines or maintenance, such percentage shall be deducted from the proceeds of any property sold, or shall be paid together with the amount levied, and with the other costs of process as stated in the warrant.

V.—When a proclamation has been issued for an absent witness, if the witness shall afterwards appear, and the Court shall be of opinion that such witness had absconded or concealed himself for the purpose of avoiding the service of a warrant upon him, such Court may order the witness to pay the cost of the proclamation.

VI.—In districts named in the margin, where the sub-divisional system has not been fully introduced, in every case where a process has to be executed at a distance more than 25 miles from the Court from which it is issued, an addition of one-fourth is to be made to the fee chargeable, and if more than 50 miles, an addition of one-half.

R. COUCH.	F. A. GLOVER.
F. B. KEMP.	CHARLES PONTIFEX.
LOUIS S. JACKSON.	W. AINSLIE.
J. B. PHEAR.	E. G. BIRCH.
A. G. MACPHERSON.	G. G. MORRIS.
W. MARKBY.	

*Onus Probandi—Enhancement—
Written Statement—Section 17
Act X. of 1859.*

The *onus* in a suit by a landlord for enhancement under Section 17 Act X. of 1859, on the ground that the productiveness of the land has increased, rests on the plaintiff who must prove that the productiveness was increased otherwise than by the agency or at the expense of the ryot.

The general rule of evidence is that if, in order to make out a title, it is necessary to prove a negative, the party who avers a title must prove it.

A written statement put in by a defendant is not a plea by way of confession and avoidance, and the whole statement must be taken together.—C. H. C. (Peacock, C. J., Bayley, Seton-Karr, Phear, and Macpherson, J. J.) 31st January 1868.—Poolin Behary Sen—IX., W. R., p. 190.

Special Appeal—Sale set aside for irregularity—Section 257 Act VIII. of 1859.

No special appeal lies against an order of the Judge, on appeal, setting aside a sale for irregularity under Section 257, Act VIII. of 1859.—C. H. C. (Peacock, C. J., Seton-Karr, Macpherson and Hobhouse, J. J.; Jackson J., dissenting) —3rd February 1868—Kooldeep Narain Singh, IX., W. R., p. 219.

Execution—Debtor purchasing decree against a co-debtor—Appeal.

One of several judgment-debtors who purchases a decree against himself and his co-debtors cannot issue execution against his co-debtors, and recover from them the whole amount of the common debt. His only remedy is to sue them in a regular suit for contribution, and to compel them to pay him their shares of the amount for which the decree was purchased.

An appeal under Section 11 Act XXIII. of 1861 against the order for execution would not affect a purchaser at a sale under the execution.—C. H. C. (Peacock, C. J., Bayley, Seton-Karr, Phear, and Macpherron, J. J.)—3rd February 1868—Degumbureo Dabee, IX., W. R., p. 230.

Majority—Act XL. of 1858—Regulations X. and XXVI. of 1793.

Every person, not being a European British subject, who has not attained the age of 18 years, is a minor for the purposes of Act XL. of 1858, and, unless he is a proprietor of an estate paying revenue to Government, who has been taken under the jurisdiction of the Court of Wards, the care of his person and the charge of his property are subject to the jurisdiction of the Civil Court, and he is a minor whether proceedings have been taken for the protection of his property or the appointment of a guar-

dian or not.—C. H. C. (Peacock, C. J., Bayley, Jackson, Macpherson and Mitter, J. J.)—7th August 1868—Madhusudan Manji, I., B. L. R., p. 49. (F. B.).

Refusal to Register—Registration Act (XX. of 1866) Secs. 49 and 82 to 84—Evidence—Act VIII. of 1859, Secs. 1 and 15.

A. brought a suit in the Moon-siff's Court against B. and C., alleging that they had sold outright to him by *saf kobala* certain landed property for Rs 300, which was duly paid; that the *kobala* was executed; that possession was given to him; that B. and C. set up before the Deputy Registrar fraudulent objections to the effect that a stipulation to return the property to the vendors on the repayment by them of the consideration-money, had not been embodied in the deed, and that part of the consideration-money was still unpaid; that, therefore, the Registrar refused to execute the deed; that in fact there was no such stipulation as set up by B. and C.; and that the whole of the purchase-money was paid; and it was stated in the conclusion of the plaint that the suit had been instituted to set aside the fraudulent objections, and to establish the full title of A. as purchaser.

Held, the suit would not lie. The unregistered deed could not be admitted in evidence, nor parol evidence of the contract be given under which A. alleged that he ac-

quired his title. A. ought to have proceeded under Sec. 83 of Act XX. of 1866—C. H. C. (Peacock, C. J., Bayley, Jackson and Macpherson J. J.; Mitter, J. *disrehtiente*)—7th August 1868—Sheik^h Rahmatulla.—I., B. L. R., p. 58 (F. B.).

Damages—Breach of Covenant in Lease—Act VIII. of 1859, Sec. 7.

A. recovered from B., under the terms of the lease set out in the case preceding, a refund of the excess of rent paid by him in respect of the years 1861, 1862 and 1863. While that suit was pending, B. recovered from A., rent at the same rate in respect of the three succeeding years. *Held*, that A. was entitled to bring another suit against B. for damages in respect of the excess of rent paid by him during the years subsequent to the institution of the prior suit.—C. H. C., (Peacock, C. J., Bayley, Jackson, Macpherson and Mitter, J. J.)—8th August 1868—Rajah Nil Money Singh—I., B. L. R., p. 97, (F. B.)

Special Appeal—Act VIII. of 1859 Sec. 347.

No appeal lies against an order rejecting an application for the re-admission of an appeal under Section 347, Act VIII. of 1859—C. H. C. (Peacock, C. J., Bayley, Jackson, Macpherson and Mitter, J. J.)—9th August 1868—Amirud-den—I., B. L. R., p. 101, (F. B.).

I.

LAW OF BILLS AND NOTES.

1. A *bill of exchange* is an unconditional written order addressed by A to B, directing him to pay a sum of money, named therein, to C.

In this case, A (who is called the *drawer* of the bill) is said to draw upon B, who is, therefore, called the *drawee*; and C, the person to whom the money is to be paid, is on that account called the *payee*.

The drawer may be himself the payee, and he may direct B to pay him simply, (as by the words "pay to me,") or to pay to him or his order, (as by the words "pay to me or my order.")

The drawer having written this order, it should be presented to the drawee to receive his assent. If the drawee assents to it, he (in this country) testifies such assent by writing his name across it, which is called accepting the bill or draft, after which the drawee is called the *acceptor*. If he refuses to accept, he is said to *dishonor* the draft or bill by non-acceptance.

When a person, in order to transfer his interest in a bill, writes his name on the back, he is called an *indorser*, and the person to whom his rights are so transferred is called an *indorsee*. Bills are often indorsed when the interest in them would pass without such indorsement, but in many cases it is necessary to indorse a bill in order to pass an interest therein; as if the

bill be payable to the drawer or his order, the drawer must indorse in order to transfer his interest, and if the bill be payable to C or his order, C must indorse.

The drawer and C would in these cases be called *indorsers*, and the persons taking from them *indorsees*.

When no such indorsement is necessary to transfer the interest in the bill, it is said to be payable to *bearer*; and a person transferring without indorsement is simply called the *transferor*, and the person who takes from him the *transferee*.

The *holder* is, in the words of Mr. Justice Byles, "the person in actual or constructive possession of the bill, and entitled at law to recover its contents from the parties to it."

2. A *promissory note* is a written promise by A to B, to pay to B, or to B or his order, a specified sum on demand, or at a certain time. The person giving the promise is said to be the *maker* of the note, and occupies a position resembling that of the *acceptor* of a bill; and the words *transferor* and *transferee*, *indorser* and *indorsee*, and *holder*, are applicable with reference to notes, the same as to bills of exchange.

An ordinary bank note is a banker's promissory note.

3. Bills of exchange, being intended for the transfer and transmission to third parties of debts due by one man to another, the drawer is supposed to be the creditor of the

drawee, who is presumed to have in his hands effects of the drawer which the latter is desirous of transferring.

An ordinary banker's cheque is a bill of exchange payable to bearer on demand.

It is therefore for the drawer to consult his convenience as to how he shall direct the drawee to pay the money (1), at what time, or (2), at what place, and (3), to whom.

For instance, the bill may be payable (1) at sight, six months after date or after sight; (2), in London, or at Drummond's bank; (3), to the drawer or his order.

Instead of directing the drawee to pay to the drawer or his order, the drawer may make the bill payable to a third person (naming him) or to such person or his order, or to bearer.

If the bill is not payable to the payee's order, it is not negotiable, and is of no use except to the payee. If it is payable to the payee's order, the payee, in order to transfer his right to it, must indorse it, and the person to whom he gives it will take the money on the bill at maturity, by virtue of the order testified by the indorsement.

If the indorsement be by simply writing the indorser's name, as is usual, the bill is then payable to bearer, and passes by delivery; though at each successive delivery an indorsement is often required for the security of the transferee.

The same rules apply where the

bill is payable to the drawer or his order.

If the drawee is directed to pay 'to bearer,' the bill *needs* no indorsement to confer a title to the money, though indorsements are often given as the bill changes hands.

Promissory notes may be made payable in the same way as bills, and with the same results.

4. The acceptor is the person who is to be liable to the drawer on a bill, so long as it remains in the drawer's hands, and is *always* the person *primarily* liable; and when the drawer, by indorsement (which is in general necessary), transfers the bill to another, the drawer in his turn becomes liable, with the acceptor, to the holder of the bill, and so does every subsequent indorser, the security thus increasing with each indorsement.

The drawer is also liable upon every unaccepted draft of his which he transfers, for by so doing he makes an implied undertaking that upon presentment to the drawee it shall be accepted.

5. The maker of a note occupies a position similar to that of an acceptor of a bill, being the person *primarily liable*, and when the note is transferred by indorsement by the payee, the indorser likewise becomes liable to the holder of the note, as does every subsequent indorser.—*Smith's Handy-Book on the Law of Bills, Cheques, &c.*

The receipt of the following Subscriptions up to the 15th March 1874 is thankfully acknowledged.

Names.	Amount.	Date of expiry of present subscription.
R. W. Hunter, Esq., <i>Bombay Civil Service and Judge, Rutnagherry, Bombay Presidency,</i> ...	Rs. 10	December 1874.
Baboo Futtick Chunder Borroah, <i>Extra Assistant Commissioner, Durrung, Tezapore, Assam,</i> ..	Rs. 5	April 1874.
Lakshman N. Joshi, Esq., <i>Judge, Subordinate Civil Court, Jacobabad, Upper Sindh Frontier District,</i> ...	Rs. 10	December 1874.
E. R. Middleton, Esq., <i>Deputy Magistrate and Deputy Collector, Scrampore,</i> .	Rs. 5	April 1874.
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(To be continued.)

PRIVY COUNCIL.

THE 27TH NOVEMBER, 1873.

*Appeal from Calcutta High Court.*BENODERAM SHIN and others,
versus

BROJENDRO NARAIN ROY.

*Execution of Decree—Long delay—
Bond fides.*

When the charge is made of want of *bond fides* in an execution proceeding, it lies upon the party making that charge to substantiate it by evidence satisfactory to those who have to decide the question.

This appeal arises out of execution proceedings which were taken to obtain execution of a judgment obtained by the appellants against Chunder Narain Roy, the father of the respondent.

The original judgment is dated on the 5th April 1855, and was obtained in the Civil Court of zillah Beerbhoom, for Rupees 7,400, and costs.

The only question which arises is whether the proceedings in execution which were commenced on the 18th May 1868 are barred by the operation of the 20th Section of the Limitation Act XIV. of 1859. The ground on which it is urged that limitation is a bar is, that no proceeding had been taken to enforce the judgment within three years next preceding the application for execution in 1868 within the meaning of the Act.

Now, unfortunately for the appellant, in this case he has been obliged to resort to no less than

four different attempts to obtain execution of his judgment. The first effort he made was, to a certain extent, fruitful and successful, for he obtained a sum of Rupees 6,650, in part satisfaction of his judgment. The proceedings in which that sum was realized commenced on the 6th August 1857, and it appears from the schedule to the petition to obtain execution in that year that he sought to attach three estates, one in zillah Beerbhoom, and two in zillah Moorsshedabad. The Court, rightly or wrongly, put him to his election whether he would take out execution first against the estate in zillah Beerbhoom, or in the other zillah. It appears that he elected to attach the estate in zillah Beerbhoom; and having attached it, proceedings were taken by the defendant to obstruct that execution, proceedings which went to the High Court. Those proceedings were undoubtedly prosecuted by the plaintiff in a vigorous manner and with success, for he obtained ultimately the sale of the estate, and under that sale obtained payment of the sum already adverted to. But it appears that the obstruction opposed by the defendant delayed that payment until the 17th March 1859. The execution proceeding was then at an end, so far as that estate was concerned, and on the 26th March of that year it was struck off the file.

The next proceeding is on the 31st December 1861. That was,

undoubtedly, within three years of the former. The execution was commenced by petition, praying for the arrest of the defendant. It appears there was then remaining due on the judgment for principal and interest a sum of upwards of Rupees 5,000. The application being more than a year after the date of the last order in execution, the Court required that notice should be served upon the defendant in pursuance of Section 216 of Act VIII. of 1859, and it appears that a formal notice was issued by the Court on the 13th April 1863, which was sent to Moorshedabad for service. It was put into the hands of the regular officer of the Court, and the nazir made a report to the Court that he had in vain endeavoured to effect personal service of it, but had affixed it to the front door of the defendant's house. That report was in May 1863. It seems that no arrest was made. Why it was not made does not certainly appear, but the plaintiff apparently desired to effect the arrest. If he did not mean to arrest the defendant, why did he obtain the order, get it transferred to Moorshedabad, and go to the expense of paying the fees of the officer for executing it? It may be that there is not sufficient to show that the defendant was absconding, but there is nothing to show that he was in the way; and when the charge is made of want of *bonâ fides*, it certainly lies upon

the party making that charge to substantiate it by evidence satisfactory to those who have to decide the question.

This last proceeding was, undoubtedly, abortive, but within three years of the report of the nazir, that is, on the 23rd March 1865, the defendant having died in the interval, a fresh petition to execute the decree by an attachment and sale of some property in zillah Dinagore was presented. It was presented to the Judge of Beerbhoom who made an order, of the date of the 31st July 1866, that copies of the decree and the application for execution should be sent to Dinagore, in order that the Judge there might execute it. It seems that the decree was taken there, and then began proceedings, which emanated from the defendant, to set aside the execution, on the ground that it was barred by limitation. The Judge at Dinagore decided that limitation was a bar. There was an appeal to the High Court by the present appellant, and he was successful in that appeal. The High Court reversed the order below, on the ground that the Judge at Dinagore had no authority to make it. In the meantime, pending that appeal, the defendant presented a petition to the Judge of Beerbhoom, praying that the proceedings might be dismissed on the ground that they were barred by limitation. The Judge of Beerbhoom decided, upon the issue

raised on that petition and the petition in answer, that the proceedings were not barred by limitation. His order rejecting the objection was made on the 29th June 1867, and in May 1868 the present proceedings were commenced.

Now it was not contended by Mr. Cutler that there was an interval of three years between the proceedings which have been narrated, and which were taken on the part of the appellant; but his sole contention before their lordships to-day was that these proceedings were not *bonâ fide*, and when pressed during the argument to show in what respect they were not *bonâ fide*, and to what particular proceedings he alluded as open to that charge, he referred to those of 1861, which were commenced by the petition praying for the arrest. He says that those proceedings were not *bonâ fide*, first, because there was delay to take them after 1859; next, that the defendant was not arrested; thirdly, that the plaintiff petitioned for an arrest instead of an attachment.

The delay may have been caused by the plaintiff making inquiries about the defendant's property before applying for an arrest. Probably, though he had inserted in his schedule estates in Moorshehabad, of which he had some knowledge, there was difficulty in reaching them, and he may have thought that if he arrested the defendant, he might obtain pay-

ment under the compulsion of that arrest. At all events it is a probable solution of the delay. He may have thought that instead of incurring the difficulty of following the estates, perhaps in other names, it would be a more cogent mode of obtaining the money to arrest the defendant.

Their lordships, in considering whether these proceedings were *bonâ fide* or not, cannot be confined to this particular attempt to revive the execution in 1861, but must look at the whole course of the proceedings; and when they find that the first proceeding to obtain execution was not only prosecuted, but prosecuted with effect, and a large sum obtained; when they find also that in the third attempt, when the defendant set up the defence of limitation and attempted to bar the proceeding, the appellant opposed him, and successfully opposed him, in two Courts, going up to the High Court; they think the case affords strong evidence of a *bonâ fide* desire to execute his decree, which was thwarted and baffled by the defendant.

Their lordships are unable to concur in the view taken by Mr. Justice Markby, that these proceedings appear to have been taken merely to keep the decree alive for some ulterior purpose. The learned Judge does not explain what ulterior purpose he supposes the plaintiff had in view, nor does he suggest any. There is no doubt it would be,

what he calls, a "nefarious practice" for plaintiff's having decrees to keep them for some wrong motive hanging over the heads of defendants; but there is not the slightest evidence that any such motive existed in this case.

Their lordships, therefore, think that upon the facts there is not only an entire want of proof of *malâ fides*, but strong evidence of a real, and in some respects, (though there are delays which are not quite accounted for) a strenuous prosecution of these proceedings.

Their lordships find that Mr. Justice Jackson gave us one of his reasons for thinking the statute was a bar, that "no steps of an effectual kind were taken." Now it is perfectly clear that the inquiry, whether the steps taken were in fact effectual, can only be material, provided the proceeding be in its nature one to enforce judgment, so far as it may be an element in considering the question of *bonâ fides*.

It constantly happens in these executions that proceedings are taken which are ineffectual, because of some mistake in the particular step which has been advised. The point was before this Committee last year in a case of *Roy Dhunput Singh, v. Madhomottee Debee*. (The judgment was delivered on the 2nd May 1872). In that case the plaintiff had obtained two decrees. He had attached some money under decree A, and then he filed a petition by mistake in suit B, praying

to have the attached amount paid out to him. When it came before the Court, the defect was pointed out, and the petition was, of course, abortive and ineffectual. In a subsequent execution suit under decree B, it became necessary for the plaintiff to establish that he had taken a proceeding within three years of the proceeding in execution which he was then prosecuting, and to rely upon the former abortive petition as a step to enforce the decree. This Committee held that although it had been of no avail by reason of a mistake, it was a step which the plaintiff had taken to enforce his decree, and, therefore, that it did protect him from the operation of the Statute of Limitations.

For these reasons their lordships will humbly advise Her Majesty to reverse the decree of the High Court, to affirm the decree of the Principal Sudr Ameen, and to order that the respondent do pay the costs of this appeal and the costs in the High Court.

PRIVY COUNCIL.

THE 7TH NOVEMBER, 1873.

Appeal from Calcutta High Court.

BISHESHUR BHUTTACHARJEE and
another,
versus

GEORGE HENRY LAMB and others.

Old Document—Evidence.

Where a document was not proved, because it was more than thirty years old, and there were no witnesses to prove it *Held* it was

necessary, in order to establish its authenticity, to show that possession had accompanied it.

This is a suit brought, as far back as the 1st of July 1853, to recover certain talooks, or zemindaries, from a person who claims under and stands in the position of a purchaser at a sale in execution of a decree against the zemindar. When the plaintiff took measures to get into possession of the estates which he had purchased, two leases, called *merasi* leases, were set up against him; and it was contended that, having purchased only the rights of the zemindar, he had purchased subject to those two leases, and that he was entitled only to the rents under them. The rents amounted to about Rs. 17 more than the Government revenue; so that the plaintiff, if the leases are upheld, instead of purchasing, as he expected, the zemindaries free from incumbrances, purchased the value of about Rs. 17 in excess of the Government revenue.

Their Lordships will take one of those documents as an example. On the face of it, it appears to be very suspicious. Chunder Narain Ghose was the zemindar; he states in the pottah that, having purchased the talook Gooroo Dass Roy, and having fixed the annual rent at Rs. 301, "you being my grand-daughter—my son's daughter—and I having received 15 gold mohurs of the value of Rs. 20 each from you, which were received as *jotook* at the ceremony of *unnoprashon*,

do grant the same talook to you by *merasi* lease;" so that he is to be supposed by this document to have sold to his grand-daughter for 15 gold mohurs, which she received at a certain religious ceremony, a *merasi* lease at the rent of Rs. 301, which was only Rs. 13 more than the Government revenue which he had to pay. That that is the value is admitted by the defendant in the answer. Indeed, it has not been disputed.

Now the Judges have found that this document had never seen the light from the time when it was granted on the 11th of Srabun 1213 (the year 1806) up to the time when the purchaser under the execution sought to get into possession of the zemindary in 1854; and that from 1806 to 1854 no public notice, no mention, had ever been made of this lease. When an execution is put in, notice is given of the execution, and any persons claiming rights in the property seized under it have a right to set them up. No claim of that sort was made in the present case. One of the defendants is the son of the grand-daughter, and claims to be entitled to his mother's right, but he never set it up when the execution was put in.

Now, in order to satisfy the Court that such a document as this was a valid document, intended to operate as a *merasi* tenure, it would be important to prove that possession had accompanied it,

The document itself was not proved, because it was more than thirty years old, and there were no witnesses to prove it. It was therefore necessary, in order to establish its authenticity, to show that possession had accompanied it. In order to corroborate the lease, another document was put in, which is called a bundobust, signed by the sons of the grandfather, who were the zemindars in 1817. Now this is an unusual document, and it does not appear for what reason it was executed. If the merasi tenure was a valid one, the grand-daughter had the right to the lease, at a rent of Rs. 301, payable yearly. The bundobust is signed by the representatives of the zemindar, and by it they make the rent of Rs. 301 (which in the pottah was payable yearly,) payable by six-monthly instalments. What reason could there have been, if the grand-daughter had got the tenure at a rent of Rs. 301 payable yearly, for her agreeing to pay it by six-monthly instalments, or for the zemindar's granting her this document making it payable by instalments? One can hardly see what the object of this could have been, except for the purpose of making it appear that the lease was treated by the representatives of the zemindar as a genuine document, and thus giving it the appearance of authenticity.

The question then turns upon the point as to whether possession

was taken under the document. The Principal Sudder Ameen has found that there was no possession taken under it. He says that the few jumma-wasil-bākees, chittahs, kubooleuts, and evidence of ryots and low caste servants which had been adduced by the defendants, were all unreliable, the documents being prepared, and the witnesses tutored.

The Judges of the High Court agreed with the Principal Sudder Ameen as to the absence of possession. They said:—"Nothing but the most complete and satisfactory evidence of good faith, coupled with reasons for the previous absence of all mention, could enable the defendants to get over so strong and significant a circumstance. Not once in half a century do these merasdar appear in Court, not once have they been sued for rent, not once have they found occasion to assert or to protect their tenure until it is brought forward as the last of a series of measures to prevent the talooks passing into the hands of the purchasers." Then they say:—"In Chunder Kant's case there is a bundobust paper of the 25th Maugh 1224, which is said to be a confirmation of his meras, but neither the authenticity, nor the occasion of this document, is sufficiently made out." Here, then, are two concurrent findings of the Lower Courts upon the question of fact, whether possession did accompany the documents; and

both Courts have found distinctly that the possession was not in accordance with the documents; that the zemindars remained in possession from the time when those meras leases were alleged to have been granted up to the time when the purchaser sought to obtain possession under the sale in execution. But then certain mouzah-waree papers were produced. The Principal Sudder Ameen made certain observations with regard to those papers. The Judges of the High Court, speaking of them, say:—"They produce what are called quinquennial or mouzah-waree papers from the Collector's office of the Bengalee year 1217, in which the meras tenures are specified. And in the case of Jugul Kishore a register book is produced, in which these papers are referred to. But the appellants fail to show for what reason these mouzah-waree papers, filed by the zemindar in the Collectorate, should contain a specification of under-tenures with which the Collector had no concern; and as to the so-called register book, we are not informed under what regulation or rule of practice it was kept; nor have the defendants taken the evidence of the Collectorate officers to throw light on the subject." Now it is contended that the Judges were wrong in making these remarks; but the fact of the Judges making a mistake, even if they did make a mistake, with

reference to the mouzah-waree papers, does not affect the other part of their finding, *viz.*, that the leases had never been made public; that they had never seen the light; and that possession had never accompanied them. Even if they did make a mistake with regard to the mouzah-waree papers, it would not be a sufficient reason for their Lordships reversing the finding upon the other question of fact. One of the Judges who gave judgment, upon a motion for review of judgment, says:—"The sole ground taken, and ably argued at the hearing by Mr. Plowden, was that the Court had come to an erroneous conclusion with respect to the mouzah-waree papers, which had been relied on to prove the existence of the talooks. I am now inclined to believe that the papers in question, though not precisely in the form prescribed by the Regulation, were nevertheless prepared in accordance with the instructions of the Board of Revenue." Therefore he admits they were mistaken, but he says:—"Even if this be fully conceded, the fact will not outweigh the other considerations which led us to disbelieve the real existence at the present time of the tenures in dispute. And with that feeling of disbelief upon our minds, produced by a review of the whole evidence, we certainly could not reverse the judgment of the Court below, simply because it had assigned reasons for its judgment

which did not appear to be extremely cogent."

The Principal Sudder Ameen's judgment is also objected to. It is said that he has given certain reasons which are not borne out by the evidence, and it must be admitted that there are mistakes in the judgments both of the Principal Sudder Ameen and of the High Court, and that they are perhaps not so satisfactory as they might have been; but the question is whether their Lordships are satisfied that they have come to a wrong conclusion upon the evidence.

Now, so far from that being the case, their Lordships are of opinion that if they had been reviewing the judgment of the Principal Sudder Ameen, they would have arrived at the same conclusion as the High Court did, that the documents were not genuine documents intended to operate in the way in which they professed to operate.

Under those circumstances, their Lordships are of opinion that the rule by which they are usually guided in not overturning the decision on a point of fact of the Lower Court, when that decision has been affirmed by the High Court, must apply in the present instance.

They, therefore, will humbly advise Her Majesty that the decision of the High Court be affirmed, together with the costs of this appeal.

CALCUTTA HIGH COURT.

The 28th November, 1873.

The Hon'ble Sir RICHARD COUCH,
Kt., Chief Justice and the Hon'ble
F. A. GLOVER, *Judge.*

ANKUR CHUNDER ROY CHOWDRY,
(Plaintiff) Appellant,

versus

MADHUB CHUNDER GHOSE and another,
(Defendants) Respondents.

Unstamped Documents—Promissory Notes.

A promissory note payable on demand which is not stamped according to Act XVIII. of 1869, cannot be used in evidence.

COUCH, C. J.—This was an appeal from the decision of the Judge of Dacca, who had dismissed an appeal from a decision of the Subordinate Judge of that District, in which he held that the instrument upon which the plaintiff sued was a promissory note payable on demand and required a stamp, and that not being stamped it could not be admitted in evidence. The instrument was in these terms:—"Rajah Narain Burdbun deposited with me Rs. 900 from your tubveel. I will pay the same on demand with interest at the rate of one per cent. per month from this date to date of payment—the 13th Bhadro 1277."

The law applicable to it is Act XVIII. of 1869. In the 25th Clause of Section 3 of that Act it is said that "promissory note includes every instrument whereby the maker engages absolutely to pay a specified sum of money to

another at a time therein limited, or on demand, or at sight." This instrument clearly comes within these words, and the plaintiff cannot make use of that part of it which states the deposit of money, and say that from the deposit there arose a contract on the part of the defendant to repay it, because here the parties have made an express contract which has been put in writing. The plaintiff cannot resort to any implied contract; if he recovers at all, it must be on the contract actually made, and he must prove that, if it is denied. And he must do it by the production of the writing, which, not being stamped, cannot be used in evidence, and the suit must fail.

But it was contended before us that in the defendant's written statement and deposition there was such an admission of the contract as made it unnecessary for the plaintiff to put the writing in evidence. Now, undoubtedly, there have been decisions in the English Courts under the Stamp Act which would support this contention; but it is doubtful whether the words of Section 18 of Act XVIII. of 1869 are not so stringent as to prevent that. In that Section there are words prohibiting not only the instrument being received in evidence, but its being acted upon in any Court. When it appears that the instrument is not stamped, although it may not be necessary to put it in evidence, these words may

prevent a Court from giving any effect to it. But we thought it right to have the plaint and written statement and deposition of the defendant translated. The plaint states that the defendant received the Rs. 900 from the fund of the plaintiff through Rajah Narain Burdhuu as "amanut," on condition of paying interest at the rate of one rupee per cent. per month, and refers to the fact of a writing having been given. The written statement denies that the money was drawn from the plaintiff's fund, and that it was received upon the condition stated in the plaint, and says that the "likhun" which was produced by the plaintiff does not contain a true statement; that the statement that Rajah Narain Burdhuu deposited with him the amount covered by the "likhun" is false. In his deposition, or oral statement as it is called, the defendant says that he wrote the "amanutee roka" which was filed by the plaintiff, but that he did not receive the money covered by it.

The plaintiff filed the instrument with the plaint as that upon which he sued. I think that the written statement of the defendant does not amount to such an admission of the contents of this document as to dispense with its production in evidence. The plaintiff did not set it out, nor did the defendant admit it in such a way as to make it unnecessary for the plaintiff to produce it. It seems to me that when

the plaintiff made it a part of his case that he should produce and prove the document, it cannot be said that his case was so admitted by the defendant that he need not produce it. Although it may, perhaps, appear a hard case, the plaintiff's suit must fail on account of the document not being stamped; still the law is so, and probably for a good reason. If the consequence of not stamping a document of this kind was not serious, the stamp law would very frequently be disregarded. In this case, whether it is a hard one or not, the questions are whether the document required to be stamped, and was it necessary for the plaintiff to put it in evidence. I think it did, and that it was necessary.

The appeal must be dismissed with costs. The decision of both the Lower Courts is right.

CALCUTTA HIGH COURT.

The 10th December, 1873.

FULL BENCH.

The Hon'ble Sir Richard Couch, Kt., Chief Justice, and the Hon'ble F. B. Kemp, Louis S. Jackson, F. A. Glover and C. Pontifex, Judges.

DOORGA CHURN SURMAH (one of the Defendants) Appellant,

versus

JAMPA DOWSE (Plaintiff) Respondent.

Arrears of Rent—Suit by Co-Sharer.

Where the ryot entered into a collusion with two out of three co-sharers for the pur-

pose of depriving the third of his share of the rents, the suit (by the third) was held to be maintainable.

This case was referred to the Full Bench on the 4th September 1873 by Couch, C. J., and Hirsch, J., with the following remarks:—

Couch, C. J.—The plaintiff in this suit is one of three co-sharers in an eight-anna share of rent payable by a ryot Doorga Churn Surmah, and she brought a suit against him and the other co-sharers for her share of the rent, alleging that they were colluding with him. Doorga Churn Surmah's defence was that he never paid any rent to the plaintiff, and he had been paying rents to the agents of Gour Chand and Lall Chand, the other defendants. Gour Chand Doss contended that the plaintiff did not live with him in commensality, and she did not receive any rent from the ryot. The Moonsiff decreed that the defendant Doorga Churn should pay to the plaintiff the rents claimed by her with costs.

This was confirmed by the Subordinate Judge on an appeal by Doorga Churn Surmah who has brought this special appeal.

It was objected for the appellant that the suit could not be maintained, and the following cases were cited:—XVII., Weekly Reporter, 408; XVII., Weekly Reporter, 414; XV., Weekly Reporter, 396.

On the other side were quoted X., Weekly Reporter, 108; XVIII., Weekly Reporter, 376; XII., Week-

ly Reporter, 30 ; III., Bengal Law Reports, 230 ; S. C. XVI., Weekly Reporter, 281, Weekly Reporter, January to July 1864, Act X. Rul., 63 ; I., Weekly Reporter, 253 ; V., Weekly Reporter, Act X. Rul., 68.

The objection was not taken in the first Court, but this seems to be immaterial as the other co-sharers were made defendants, and the plaintiff could not compel them to join her as plaintiffs.

The question which arises is whether the suit can be maintained, and as we differ from the decisions that it cannot be maintained, we refer this appeal for the final decision of a Full Bench.

The judgments of the Full Bench were delivered as follows :—

KEMP, J.—The question which has been referred to the Full Bench in this case is whether the present suit can be maintained.

I am of opinion that the present suit can be maintained. The plaintiff sues for rent of the years 1277 and 1278, alleging that she is jointly in possession of a share in the estate, and has hitherto received the rents in proportion to her share. She has made her co-sharers defendants in the suit.

The defendant No. 1, the ryot, altogether repudiated the plaintiff's title, and alleged that he had paid the whole of the rents for the years 1277 and 1278 to another party, namely, the defendant No. 2. The defendant No. 2, a co-sharer, also

disputed the plaintiff's title, and stated that the plaintiff never lived in commensality with him, and that she has never received any rent from the defendant No 1, the ryot.

Both Courts have found on the evidence that the plaintiff has all along received rent up to the date preceding that of the institution of the suit. They have also found that the defendant, the ryot, was called upon by the plaintiff to pay rent, and that the defendant No. 1, the ryot, knowing that the surburakar to whom he had been paying the rent had been discharged by the plaintiff, withheld payment of the rent of plaintiff's share.

Under these circumstances I am of opinion, upon the findings of fact of the two Lower Courts, and inasmuch as the co-sharers have been made defendants, that the suit is maintainable.

JACKSON, J.—I am also of opinion that the present suit is one which the plaintiff was entitled to maintain. There is a class of suits somewhat resembling the present, in which I have, on several occasions, expressed an opinion that the plaintiff is not entitled to sue separately, that is to say, where several persons being jointly entitled to receive rent from a ryot, and having been accustomed to receive such rent jointly, afterwards one or more of them brought separate suits against such ryot in respect of their separate shares. In those cases it was held that the nature of the

contract or holding being such that the ryot was accustomed to pay his rent in one sum to the joint agent of the owners, he ought not to be harassed by being sued in several suits in respect of portions of the same claim. Here the case is different. The owners, it is true, have been accustomed to collect the rents jointly (at least I understand that to be the finding) and by a joint agent; but the parties who have been made defendants along with the ryot had subsequently taken from the ryot, with his consent, their own separate shares of the rents, and the suit which the plaintiff brought was in effect a suit to recover an arrear, which arrear corresponded with her own share of the rent which the ryot had vexatiously and collusively refused to pay. That amount still remained unpaid, and the plaintiff being entitled to it, it seems to me that she was justified in bringing this suit making at the same time the other co-sharers parties as defendants. In point of fact, the conduct of the defendant was not that of a ryot who complained of being subjected to several suits in respect of one claim; it was that of a ryot entering into a collusion with two out of three co-sharers for the purpose of depriving the third. Under these circumstances, it is difficult to see what other course was left to the plaintiff than to sue these parties, in order to recover that which was

justly due to her and to her alone. I therefore think that the suit was properly maintainable.

GLOVER, J.—I concur in thinking that, under the circumstances of the case, the suit was maintainable, and I do so generally for the reasons given by Justices Kemp and Jackson.

PONTIFEX, J.—Under the circumstances of this case, I think there is no doubt whatever that this suit is properly maintainable; and, as at present advised, I am not prepared to say, when a ryot is holding under co-sharers but not under a written contract, that one of the co-sharers cannot sue separately for his share of the rent if he makes the other co-sharers defendants.

CONCH, C. J.—I concur in the opinion that has been given that the present suit is maintainable. That was my opinion when the question was referred to the Full Bench. The appeal will be dismissed with costs.

CALCUTTA HIGH COURT.

The 10th December, 1873.

FULL BENCH.

The Hon'ble Sir Richard Conch, Kt., Chief Justice, and the Hon'ble F. B. Kemp, Louis S. Jackson, F. A. Glover, and C. Pontifex, Judges.

DINO MONEE DEBIA (*Defendant*)

Appellant,

versus

DOONGA PERSHAD MOJOOMDAR

(*Plaintiff*) *Respondent.*

Allegation of Tenancy and Plea of Limitation.

In a suit for possession of land brought against a person who is really a trespasser, the defendant, having alleged tenancy to plaintiff in his written statement, does not preclude himself from setting up the defence of the law of limitation.

This case was referred to the Full Bench by Jackson and Mitter, J. J., on the 12th August 1873, with the following remarks :—

MITTER, J.—The plaintiffs in the Court below, now special respondents before us, brought this suit for the possession of certain lands on the allegation that they had been ejected therefrom by the defendants in the year 1269 B. S.

The defendants urged in their written statement that the suit was barred by the statute of limitations, and that they were entitled to hold the lands in dispute under a mouroosee lease granted to them by the predecessor of the plaintiffs.

The Court of first instance tried the issue of limitation with the merits of the case, and came to the conclusion that the plaintiffs were not entitled to recover.

On appeal the Judge held that the question of limitation could not arise in a case like the present, inasmuch as the defendants had admitted in their written statement that they were the tenants of the plaintiffs, and the case was accordingly sent back to the Court of first instance for further investigation. Subsequent to this order of remand, both the Courts below

have given a decree to the plaintiffs; but the facts found by the Lower Appellate Court are, firstly, that the plaintiffs have failed "to prove their alleged dispossession and previous khas possession;" and, secondly, that the defendants were mere "trespassers," no relation of landlord and tenant having ever existed between them and the plaintiffs.

The questions raised on special appeal are :—

Firstly.—Whether the Lower Appellate Court is right in overruling the plea of limitation upon the grounds set forth in its judgment, and

Secondly.—Whether the finding of that Court on the question of possession is sufficient as it stands to meet the requirements of that plea.

With reference to the first question, I am of opinion that the contention of the special appellants is sound. It is no doubt a correct proposition of law that a tenant is not entitled to plead limitation against his landlord. But this proposition, I apprehend, is applicable to those cases only in which the parties are really related to each other as landlord and tenant. In the present case the Judge has found as a fact that there was no such relation between the parties; and it follows therefore that he has applied the law of landlord and tenant to a case which, according to his own

finding, is not a case of landlord and tenant at all.

It has been argued that the defendants have deliberately placed themselves in the position of tenants; and as a tenant is not entitled to plead limitation against his landlord, the Court cannot allow the defendants to take up a plea which is inconsistent with the position they have voluntarily assumed. I am of opinion that this argument is not sound.

In the first place it is not very clear whether the doctrine of estoppel by pleading is applicable to cases in this country. But without entering into this question, I think I may safely affirm that we have got no such things as pleadings technically so called. The written statements filed in our Courts are not pleadings in the strict sense of the term. Section 123 of the Code of Civil Procedure lays down what a written statement should contain, and it says in so many words that "written statements should not be by way of answer one to the other." Then again Section 129 enacts that it is *for the Court to lay down*, "*all the issues of law and fact upon which the right determination of the case may depend*;" and it further says that "the Court may frame the issues from the allegations of fact which it collects from the parties or their pleaders, *notwithstanding any difference between such allegations of fact and the allegations of fact contained in the written statements*, if any,

tendered by the parties or their pleaders." These provisions not only show that pleadings strictly so called are unknown to our Code, but also and specially that an allegation of fact made in a written statement is not by itself absolutely binding against the maker.

But if the doctrine of estoppel by pleading is not applicable to this case, there seems to be no other doctrine or principle of law upon which the plaintiffs can take their stand. An admission deliberately made by a party is certainly admissible as evidence against himself. But if we once treat the admission of the defendants in this case as a mere matter of evidence, the argument of the plaintiffs must fall to the ground. An allegation of fact which is found to be untrue must be treated *as such* for all the purposes of the suit, inasmuch as it would be obviously illogical and unsound to make one and the same decision depend upon two states of facts diametrically opposite to each other. If we decide as a matter of fact that the defendants were trespassers, we cannot in the same case overrule the plea of limitation upon the assumption of a quite different state of facts, namely, that the defendants were the tenants of the plaintiffs. If the plaintiffs can say to the defendants that they, the defendants, cannot be permitted to blow hot and cold by taking up a plea which is inconsistent with the case relied upon by them, the de-

defendants also can say to the plaintiffs with equal reason that they, the plaintiffs, should not be permitted to blow hot and cold by getting rid of the plea of limitation upon the ground of a supposed tenancy which has never existed in fact, and which they themselves have been repudiating throughout, inasmuch as their case was that the defendants have been holding possession as trespassers. Neither of the parties can complain that their status has been altered or affected in any manner by the false allegations of fact put forward by their adversaries, and I do not therefore find any reason why any of those allegations should be used as an estoppel against either of them in any sense of the term.

It has been said that the question of limitation cannot possibly arise in a case like the present, until it is determined that there is no relation of landlord and tenant between the parties; and as the issues must be laid down before the case is heard on the merits, no issue of limitation could be laid down by anticipation. This argument is not, in my opinion, entitled to any weight. It is the duty of the Court to lay down all the issues of law and fact upon which the right determination of the case depends, and those issues or such of them as would be sufficient for such determination must be determined in the most rational order which the circumstances of the case will per-

mit. There is no law that I am aware of which says that the issue of limitation must, in every case, be invariably tried at a particular stage of the trial, or that no such issue ought to be laid down if it is found that its determination would depend upon the previous determination of the other issues involved in the case or of any particular class of them. Suppose, for instance, that a suit is brought to recover property from the hands of an alleged trustee. The defendant denies the trust, but at the same time relies upon the ordinary rule of limitation in his defence. Can it be said that the issue as to whether the suit is barred by the ordinary rule of limitation or not, ought not to be laid down in such a case, because the occasion for determining that issue would not arise until it is determined that the case is not a case of trust at all?

It may be said that in the case supposed there is no inconsistency between the issue of limitation and the case set up by the defendant upon the merits. But I have already disposed of this last-mentioned objection, and I have referred to the above illustration simply for the purpose of showing that the argument based upon the supposed difficulty of laying down the issue of limitation in a case like the present is not, by itself, of any weight whatever.

It may be urged that the defendants ought not to be permitted to fall back upon the statute of limi-

tations after they have failed to substantiate the false defence which they have been foolish enough to set up. But the Court has no power to inflict any penalty of this kind, unless it is authorized to do so by an express legislative enactment. This point has, I believe, been finally set at rest by the decision of the Privy Council in the case of *Ranee Surnomoyee, vs. Rajah Suteesh Chunder Roy*,* so that I have simply to add that, if the defendants are to be visited with such a penalty, there seems to be no reason why some similar penalty should not be inflicted upon the plaintiffs for having falsely alleged in their plaint that they had been dispossessed by the defendants in the year 1269 B. S.

Let us suppose for one moment that the plaintiffs had come forward with an allegation in their plaint that they had been dispossessed by the defendants (a party of trespassers) on a date more than 12 years previous to the institution of this suit. Such a claim would be barred by limitation on the very face of it, and the Court would be bound, under the provisions of the 32nd Section of the Code of Civil Procedure, to reject it upon that ground without even summoning the defendants. But if the subsequent appearance of the defendants with a false allegation of tenancy could save the plaintiffs from the consequences of their own

laches, such rejection of their claim would be not only premature but unjust; and hence it follows that in the case supposed, the fate of the plaintiffs' claim would be precisely the same whether its liability to be dismissed on the ground of limitation is discovered before or after the appearance of the defendants. How, then, can it be said that the law of limitation would not apply to this case, if the defendants have been *de facto* in possession for a period of more than 12 years prior to the date of suit, not of tenants, but as the Judge himself has found as "*trespassers*." The defendants have not been allowed to derive any benefit whatever from their allegation of tenancy, and, if the cause of action of the plaintiffs had really accrued more than 12 years prior to the date of this suit, it would be manifestly unfair to allow them to derive any benefit either from the false allegation of tenancy set up by the defendants, or from the equally false allegation which they themselves have put forward in their plaint with reference to the date of their dispossession; particularly when it is borne in mind that, if they had candidly admitted in that document that they had been dispossessed more than 12 years prior to its presentation, the Court would have been bound to dismiss their claim on the ground of limitation, without even waiting for the defendants. So far as falsehood is concerned,

* 2. W. R., P. O., 13.

both the parties are equally guilty, if the Judge's findings are correct; and as the Court is bound to base all its conclusions upon a true and not upon a false state of facts, there seems to be no reason why the statutory bar should not prevail, if it is really applicable to the actual facts of the case. Every suit must be brought upon a certain cause of action, and it must be further shown that the cause of action is not barred by lapse of time. I do not mean for one moment to say that a plaintiff is bound to prove the precise date of his cause of action as alleged in the plaint; but he is, in my opinion, clearly bound to show, when required, that the cause of action has not been extinguished by operation of time. The only case in which the view taken by me might appear to be hard is that in which there is not only an admission in the written statement of the defendant that he was the tenant of the plaintiff, but in which it is also found that the defendant has been avowedly claiming to hold as a tenant throughout the entire period of his possession. But the present case stands upon a quite different footing. The plaintiffs have neither alleged nor proved that this was the real state of things, and as for the defendants, their allegations have been found by the Judge to be untrue. But be this as it may, there seems to be no reason why the law of limitation should not apply even to a case like

the above. Whether the defendant did, at any time during the period of his possession, acknowledge that possession to be the possession of a tenant or not, it seems to be pretty clear that no such acknowledgment can stop the operation of the law of limitation. The plaintiff's cause of action remains the same. That cause of action originated in a wrongful act of dispossession by the defendant, and no pretended title of tenancy set up by the latter can alter either the nature or the date of that dispossession, or convert the case into one of landlord and tenant, when in point of fact there was no such relation between the parties. The plaintiffs might have and ought to have sued upon their cause of action within the period prescribed by the statute, or they might have put an end to the dispute by accepting the defendants as their tenant. But in the absence of such acceptance, the case must be dealt with throughout as a case against a trespasser, and not as a case between a landlord and tenant.

Much stress has been laid by the respondents upon a decision passed by a Division Bench of this Court, which is reported in page 398 of the 7th Volume of the Weekly Reporter. But for the reasons above stated I am unable to concur with the learned Judges by whom that decision was passed, and I would therefore refer the question to a Full Bench for an authoritative decision.

With reference to the second question raised in this special appeal, I am of opinion that the Judge's finding on the point of possession is not sufficient to meet the requirements of the issue of limitation. The plaintiffs might have failed to prove the precise date of dispossession alleged in their plaint, and they might have also failed to prove their khas possession immediately previous to that date. But it still remains to be seen whether the plaintiffs were in possession, either actual or constructive, at any time within 12 years prior to the institution of this suit. I would therefore remand this case to the Lower Appellate Court for a fresh trial of the issue of limitation, subject to the opinion of the Full Bench on the following point, namely, whether in a suit for possession of land brought against a defendant who is really a trespasser, but who has set up a false case of tenancy, the issue of limitation can be raised and determined.

JACKSON, J.—I concur in the order of reference to the Full Bench. The effect of the decision appealed against, as it stands, is that the defendants are found as a fact to have held the land in dispute as trespassers, that is, adversely to the plaintiffs, but because they have alleged themselves to have been tenants of the plaintiffs they are debarred from setting up the plea of limitation. This view is supported by the case in 7, Weekly Re-

porter, page 393, which has been referred to by Mr. Justice Mitter. In that case the learned Judges observe that, by admitting the right of the plaintiff as the owner of the land in dispute, and acknowledging himself to be the plaintiff's tenant, the defendant precludes himself from pleading adverse possession or limitation. It seems to me that a fallacy lurks in those words, because the question is not so much whether the defendant is to be permitted to set up a plea under the law of limitation, as whether the Court is to apply that law to the facts which may be found. It seems necessary therefore that this point should be authoritatively settled.

The judgment of the Full Bench was delivered as follows by :—

CORRY, C. J.—The question which is referred to the Full Bench is, whether in a suit for possession of land brought against a tenant who is really a trespasser, the defendant setting up a false case of tenancy, the issue of limitation can be raised and determined. And the terms in which the question for the Court has been framed is illustrated by the facts as stated in the judgment of Mr. Justice Mitter.

The defendants in their written statement alleged that the suit was barred by the law of limitation. They also alleged that they were entitled to hold the lands in dispute under a mouroosce lease granted to

them by the predecessor of the plaintiffs. They may have honestly believed that this was the fact, and that such a lease had been granted. They may have failed to prove it, and, in fact, according to the finding of the Lower Courts, they did fail. I think a written statement putting forward a defence in this manner ought not to be treated as a conclusive admission by the defendants that the facts are as they allege, if the plaintiff denies the truth of the written statement and has an issue raised upon the allegation. If he had accepted the written statement, and the case had been tried upon the admission so made, it would have been proper for the Courts to consider as the true state of things that there was a tenancy between the parties. Of course, if there was a tenancy, the law of limitation would not apply. But here the plaintiffs did not accept the statement of the defendants as to the tenancy. They denied it, and they succeed in disproving it. And although the plaintiffs have done that, and have shown that it is not the true state of things, the Courts have given effect to the admission as if it was true, and have said that the law of limitation shall not apply to the case. If the tenancy is to be taken to be the true state of things as proved by the admission, and not contradicted by the other party, I think the law of limitation will not apply. If this was intended to be decided

in the cases referred to, I concur in those decisions. But here the question really is this:—Is a defendant to be prevented from setting up the defence that there is a tenancy, and at the same time relying upon the law of limitation, if the facts should prove to be such as will support that defence? I think that, in many cases, it would be productive of the greatest hardship if the defendant was obliged to relinquish the defence of the law of limitation, where he might really have it, in order to be able to say, I believe that I can prove a tenancy between the plaintiff and myself, and I desire to rely upon that. I think we ought to hold that, merely by alleging the tenancy in his written statement, he does not preclude himself from setting up the defence of the law of limitation. Whether there is that defence to the suit, ought to be determined upon what the facts are proved to be, if the plaintiff resolves to have them enquired into, as was the case here.

KEMR, J.—I concur. I wish only to add that the defendants in their written statement, which I have referred to in the original, set up a mouroosce holding with reference to some of the plots of the land for which the suit was brought, and with reference to other plots they set up an independent title claiming them as belonging to another talook than that of the plaintiff.

JACKSON, J.—I concur with the learned Chief Justice.

GLOVER, J.—I concur.

PONTIFEX, J.—I concur.

CALCUTTA HIGH COURT.

The 10th December, 1873.

FULL BENCH.

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, Louis S. Jackson, F. A. Glover, and C. Pontifex, *Judges*.

UNNODA PERSAUD ROY and others
(*Plaintiffs*) *Appellants*,

vs.

MESSRS. ERSKINE and Co.
(*Defendants*) *Respondents*.

*Suit to set aside a sale—Separate
suit by Co-Sharers—Valuation.*

In a suit brought by a shareholder to set aside a sale of a property held by several shareholders, in which he asked to have possession of his own share, and valued accordingly : *Held* that the plaintiff was unable to sue in that way. The cause of action was the sale of the whole, and the suit ought to be framed and valued accordingly, and be brought in such a Court that the rights of all the parties interested in setting aside the sale might be declared in one suit.

This case was referred to the Full Bench on the 2nd September 1873 by Markby and Mitler J. J., with the following remarks :—

MARKBY, J.—In this case one Kasheenath Roy sued certain persons whom they describe as "Messrs. Erskine & Co." and eight other persons, alleging that a cer-

tain putnee talook was held by seven co-sharers, of which the plaintiff held one share, and certain of the defendants the remainder, each shareholder collecting his own share of the rent from the mehal ; that defendant No. 1, alleging that he had purchased the zemindaree right over this putnee, had brought a suit before the Collector under Regulation VIII. of 1819, praying for the sale of the putnee talook on account of arrears of rent ; and a sale of the putnee talook having been directed, the defendant purchased it himself and took possession ; that the plaintiff appealed to the Commissioner, but was unsuccessful ; that he therefore, on the various grounds set forth in the plaint, brought this suit to recover possession of his one-seventh share by setting aside the sale.

The plaint also contained an allegation that the plaintiff was not on good terms with his co-sharers, and that they were acting in collusion with the zemindar.

The suit was valued at Rs. 365, being the value of the plaintiff's one-seventh share.

The whole putnee talook is registered in the plaintiff's name in the zemindar's *serishtah*.

Several other shareholders have filed similar suits, each in respect of his own share.

Both the Lower Courts have dismissed all the suits on the ground that one suit ought to have been brought by all the co-sharers to

set aside the sale and recover possession of the whole talook.

All the cases are brought up to this Court on special appeal, but only one appeal has been argued (No 102.)

Both the Lower Courts in dismissing this suit rely on the decision of E. Jackson and Ainslie, J. J.,* in VII. Bengal Law Reports,

* The 3rd May, 1871.

Present :

The Hon'ble E. Jackson and W. Ainslie,
Judges.

Cases Nos. 2455 to 2459 of 1870.

Special Appeals from a decision passed by the Subordinate Judge of Mymensingh, dated the 26th August 1870, affirming a decision of the Mooniff of Bajitpore dated the 30th December 1869.

Bissonath Bhuttacharjee and others (Plaintiffs) *Appellants,*

versus

The Collector of Mymensingh and others (Defendants) *Respondents.*

Baboo Sreenath Doss and Kashee Kant Sen for Appellants.

Baboo Unnoda Pershad Banerjee, Juggadammund Mookerjee, and Nullit Chunder Sen for Respondents.

JACKSON, J.—We think the Lower Courts were quite right to refuse to allow these suits to be carried on as they have been instituted. Five plaintiffs, who are co-sharers in a certain tenure, have brought five different suits to recover each their own separate share in that tenure. Independent of the question whether under such circumstances each different co-sharer would not be obliged to pay a sufficient stamp covering the whole tenure (which we are inclined to think he would, though we do not directly decide the point), we think the suits cannot be allowed to proceed in this shape. It is very clear that all the parties were ready to bring their suits, inasmuch as they have brought these

Appendix, page 42, and that case appears to us to support the view taken.

On the other hand, in a similar case reported in XIV, Weekly Reporter, 490, Loch and Mitter, J. J., allowed the holder of a small share to sue alone for and to recover that share.

Under these circumstances, we refer to the Full Bench the question whether one suit by all the shareholders to set aside the sale

suits almost at the same time; we believe they have employed the same vakeels,—certainly they have employed the same vakeel in this Court, and there seems to be no reason whatever why they should not employ the same vakeel. It is not right that the defendants should be harassed by these five different suits when one suit is sufficient.

It has been thrown out that this has been done in order to remove the jurisdiction from the Subordinate Judge to the Mooniff. It is immaterial whether it was done with that intention or not; the result is that that is the effect of bringing these suits in the manner in which they have been preferred. As the plaintiffs' vakeel states that he has no objection to their being consolidated into one suit we direct that they shall be consolidated and we set aside the order dismissing those suits, and we direct that the cases shall be sent to the Court of the Subordinate Judge, who will take them up as one case and proceed to trial as if the case had been instituted before him. But before this order will have effect, we think that the plaintiff is bound to pay into Court all the costs which have been incurred by the defendants up to this date. We therefore allow the plaintiff one month's time to pay into Court all such costs; and if the money is paid in within that time, this order will stand good; if not, these appeals will be dismissed. Let the costs incurred in this Court be certified to the Court of the Subordinate Judge.

and to recover possession ought to have been brought, or whether, as the appellant maintains, each shareholder was entitled to sue separately.

MISTER, J.—I concur.

The judgment of the Full Bench was delivered as follows by :—

COUCH, C. J.—We think that in deciding this case we must take the latter part of the question which has been stated by the learned Judges, and take it in connection with what the suit appears to be. We are asked whether in a suit to set aside the sale of a property held by several shareholders each of them is entitled to sue separately, but we think we must consider the question as meaning entitled to sue separately in the manner in which the present suit is brought. It is a suit to set aside the sale of the property. It is true that the plaintiff has made the other co-sharers defendants in the suit; but he has asked to have the possession of his own share. Although he may have in terms asked to have the sale set aside, he is by the valuation of his suit limited to the setting aside the sale of his own share only. By the framing of the suit in this way, he has brought it in a Court in which he could not have brought it if it had been a suit to set aside the sale as to the entire property. We think he was unable to sue in that way. He has in fact sued in respect of

part only of the cause of action, namely, that which applied only to himself. The cause of action was the sale of the whole, and the suit ought to be framed and valued accordingly, and be brought in such a Court that the rights of all the parties interested in setting aside the sale might be declared in one suit. We think the decisions of the Courts below were right, and that the appeal should be dismissed with costs.

PRIVY COUNCIL.

THE 28th NOVEMBER, 1873.

Appeal from Calcutta High Court.

MIRZA HIMMUT BAHADOOR,

versus

SAHEBZADEE BEGUM and another.

Mahomedan Law—Acknowledgment—Heirship.

There is no question that under the Mahomedan Law acknowledgments may be made of such a kind as to operate not merely as admissions but as actually conferring certain descriptions of status, among others a status of heirship, limited or general, as the case may be, upon the persons acknowledged.

This was a case in which Mirza Himmute Bahadoor was the plaintiff, Sabezadee Begum and Mussamut Bismullah Begum, one being the widow and the other the illegitimate sister of Mirza Ekbal Bahadoor, were defendants. The case of the plaintiff was that he was one of the co-heirs of Mirza Ekbal. If this point were decided in his favour, other questions would arise, respecting the title of the widow to

dower, and the title of the sister to maintain possession of certain property of Ekbal which she was possessed of; but if the question of heirship be decided against Mirza Himmut, none of these questions arise, and their lordships are of opinion that the judgment of the High Court is right, which decided this question against him.

In the Court below a question was raised on which a good deal of evidence was given, and which was discussed at great length, whether or not Mirza Himmut and Ekbal were the legitimate sons of their mother Baratee and their father Modenarain Sing, but the Court below as well as the Court above have come to the conclusion that there was no marriage between their parents, and it must be taken and indeed is admitted that they were illegitimate. The Court below held, however, that notwithstanding this illegitimacy, and notwithstanding therefore that by the law of the Sheah sect of the Mahomedans (which by admission of both parties applies to this case), the plaintiff would not be heir of Ekbal,—that Ekbal had so acknowledged the plaintiff to be his heir that the plaintiff acquired that status, and was entitled to succeed to his property as such. The High Court, agreeing with the Court below upon the first question as to the legitimacy, reversed its decision upon the second point, being of opinion that there was no

proof of any such acknowledgment on the part of Ekbal; and the sole question before their lordships now is whether or not there was such an acknowledgment. There is no question that under the Mahomedan law acknowledgments may be made of such a kind as to operate not merely as admissions but as actually conferring certain descriptions of status, among others a status of heirship, limited or general, as the case may be, upon the person acknowledged. With respect to acknowledgments of relationships, their lordships have been referred to Mr. Baillie's "*Digest of Mahomedan Law*," Part I., published in 1865, and they find it there thus laid down:—"The acknowledgment of a man is valid in regard to five persons, his father, mother, child, wife, and mowla, because in all these cases he acknowledges an obligation, and it is not valid except for these," and then, further, after giving cases of those acknowledgments which have been stated to be valid, on page 406 this is found:—"The acknowledgment of a man is not valid with respect to any other persons than those before mentioned, such as a brother, or a paternal or a maternal uncle, or the like," so that if this passage stood without further explanation it would lead to the conclusion that by the Mahomedan law an acknowledgment of one person by another as his brother, and as such his heir and successor, would have no vali-

dity. However, the passage is further explained thus :—" When it is said that the acknowledgment of a man is not valid with respect to any other than those above-mentioned, it is only meant that it is not obligatory on any other except the acknowledger and the acknowledged; but with regard to such rights as affect them only the acknowledgment is valid, so that if one were to acknowledge a brother, for instance, having other heirs besides who deny the brothership, and the acknowledger should die, the brother would not inherit with the other heirs, nor would he inherit from the acknowledger's father if he denied the descent, but he would be entitled to maintenance as against the acknowledger himself during his life." The acknowledgment contended for consists in this and this only :—it appears that after the death of the mother a proceeding in the Civil Court of Gya was instituted on the 20th January 1866, in which it is recited that Mirza Himmut Bahadoor, Mirza Ekbal Bahadoor, and Mussamut Bismullah Begum, sons and daughter of Mussamut Baratee Begum, deceased, by their pleaders, prayed for a certificate under the provisions of Act XXVII. of 1860, on the proof of heirship to the said Mussamut Baratee Begum. That, coupled with this further fact which appears, that these three did by some means or other obtain possession of some property belong-

ing to an elder sister, apparently in the character of her heirs, is relied upon as such an acknowledgment as to constitute the status of full brotherhood and heirship on the part of the plaintiff to the defendant. Their lordships are of opinion that it would be carrying the doctrine of heirship constituted by acknowledgment to an extent to which it has never been carried before, and farther than the principles of the Mahomedan law as to acknowledgments warrant, if they were to give such an effect as has been contended for to what is but an argumentative or inferential admission at best. All that is directly admitted by the statement in Court, (the language, being that of the pleader of the parties), is that the plaintiff and the defendant were the sons of Baratee, and as such claimed her property. It is sought to deduce from this that they must therefore necessarily be taken to have declared, not only that they were sons and heirs of Baratee, but that they were to all intents and purposes brothers and heirs to each other,—“ full brothers” is the term in the plaint,—and that they were entitled to succeed to each other's property, not only property obtained from Baratee but any property which may have been obtained by either of them from any source whatever. It appears to their lordships that it would be very unduly stretching the purport of this docu-

ment to give it any such interpretation. It does not appear to their lordships by any necessary implication that they must have intended to constitute each full brother of the other for all intents and purposes as has been contended. It may be that they sought to avail themselves of the Soonee Mahomedan law, whereby, as it was admitted, they would, although illegitimate, be heirs of their mother. If that were so, the statement in this document amounts to no admission at all, but simply to a statement of fact, and to the inference which the law would derive from that fact. But, be that as it may, their lordships are of opinion that it is by no means shown, and no inference can be fairly deduced, that it was the intention of the parties by this document to constitute each brother to the other, so as to make him an heir to his estate.

This being their lordships' opinion on the question of fact, it is unnecessary for them to consider the question whether the widow, who is generally included with the other sharers in the term "heirs," but is not, like sharers, entitled in the absence of "residuaries" to a "return," is or is not an heir in the sense in which the word is used in the passage above cited, and also in the passages in the Hedaya to which their lordships were referred in the course of the argument, so that her existence would

have ~~usually~~ the effect of the acknowledgment, had one been proved.

On these grounds their lordships are of opinion that the judgment of the High Court is right; and they will humbly advise Her Majesty that it be affirmed, and this appeal dismissed with costs.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION.

The 9th, 10th & 30th March, 1874.

MR. JUSTICE MACPHERSON.

RAM COOMAR COONDOD and another,

vs.

CHUNDER CAUNT MOOKERJEE.

Maintenance—Recovery of damages from the person instituting and maintaining litigation in the name of another.

In a suit the plaintiffs sought to recover damages from the defendant for injuries caused to them by him by means of certain litigation carried on against them by or in the names of other persons. *Held* that, the suit will lie. The principle that those who maintain, and are the persons chiefly interested in the result of, suits instituted by them in the names of others, may be compelled to recoup to the defendants who are sued the costs incurred by them in defending themselves, has been frequently recognized and acted on in the High Court.

MACPHERSON, J.—The plaintiffs seek to recover damages from the defendant for injuries caused to them by him by means of certain litigation carried on against them by or in the names of one John McQueen and his wife.

The whole litigation was, in fact, conducted by the defendant in the name of the McQueens, but at his own expense, under an agreement entered into between them and the defendant on the 17th of July 1867. That agreement is embodied in an indenture, in which it is recited that Mrs. McQueen is entitled to certain property in Howrah, then in the possession of the Coondoos (the now plaintiffs); that the McQueens, "having no funds wherewith to adopt or commence any legal proceedings" for the recovery of the property, had applied to the defendant to assist them in commencing and conducting the necessary suits, and to make all the requisite advances and disbursements connected therewith until their final termination; and that the defendant had agreed to do so, and also, as the McQueens had "no means whatever," to pay to them or the survivor Rs. 150 a month until the final termination of the litigation. The McQueens then (by the deed) appoint the defendant their attorney to institute and prosecute all necessary suits, to sign all papers and documents, to receive all monies, and take possession of all lands, &c., to which the McQueens may become entitled under any decree or order that may be made, and to appoint attorneys and vakeels, &c.; and the defendant covenants to institute and prosecute the necessary suits and proceedings, and to make

all requisite advances and payments, and to pay the McQueens Rs. 150 a month during the pendency of the suits. Then it is agreed that out of the monies or proceeds of lands, &c., recovered, the defendant shall, *in the first place*, retain and reimburse himself all advances and payments made by him, with interest thereon at 12 per cent.; *in the second place*, retain to himself, by way of remuneration for his trouble and risk, one-third of the nett proceeds of the litigation (after repaying himself with 12 per cent.); and, *in the third place*, make over the remaining two-thirds to the McQueens. The McQueens further covenant not to intermeddle with the defendant in the prosecution of the litigation, and that they will render him all possible assistance, and that the power of attorney given by them to the defendant shall be irrevocable so long as he prosecutes the litigation, and pays the monthly allowance of Rs. 150. But there is a proviso that, if McQueen chooses to devote his whole time to it, he may have the management of the suit, *but under the control of the defendant*; and that the McQueens may at any time revoke the power of attorney given by them to the defendant on paying him all that he has advanced, with interest at 12 per cent., and the sum of Rs. 2,000 by way of liquidated damages. And power is reserved to the McQueens to compromise, but only with the con-

sent of the defendant, unless the sum to be received on the compromise should exceed the total amount of the defendant's advances with 12 per cent.

This agreement having been entered into, a suit was commenced against the present plaintiffs, on the 8th of August 1867, in the name of the McQueens, in the Hooghly Court.

On the 17th of April 1868, the suit was heard, and was dismissed with costs. Thereupon there was an appeal to the High Court, which, on the 15th of April 1869, reversed the decree of the Judge of Hooghly, and gave judgment in favour of the McQueens.

On the 11th of May 1869 the Coondoo's filed their petition for leave to appeal to the Privy Council. On the 14th the McQueens (suppressing the fact that an appeal had been filed) got an order for execution, under which they, on the 17th, were actually put in possession of the property at Howrah, and also attached other property of the Coondoo's in order to obtain payment of the costs which had been decreed to them.

On the 10th of July the High Court directed that the Coondoo's should be restored to possession (on giving security), unless the McQueens gave security for what they might receive pending the appeal and for costs; and on the 21st December 1869 security (in fact, provided by the defendant) to the ex-

tent of Rs. 12,000 was given by the McQueens, who continued in possession, and also recovered the sum of Rs. 4,739 from the Coondoo's by way of costs.

On the 3rd of September 1870 the McQueens brought a suit for *wasilat* in the Hooghly Court against the Coondoo's, and got judgment for a large sum.

In September 1871 the defendant agreed to purchase the whole property and all the rights of the McQueens therein, and in the appeal to the Privy Council, and in the *wasilat* suit. On the 21st of September in that year the McQueens executed what is called a memorandum of agreement, which was produced by the defendant's attorney at the trial, and which is in the following words: "Whereas we (the McQueens), for the consideration hereinafter mentioned, agree to sell and convey all our right, title, and interest in the land, &c. (describing the property), and also all our right, title, and interest of and in a certain suit in respect thereof, now pending in appeal to the Privy Council, and also all our right, title, and interest in a certain suit now pending in the Hooghly Court for mesue profits in respect of the said land and premises, to Chundercaunt Mookerjee for the sum of Rs. 22,000, made up as follows: Rs. 12,500 due by us to the said Chundercaunt Mookerjee for monies paid to us and on our account, and in respect of

which sum of Rs. 12,500 we have this day examined the accounts of the said Chundercaunt Mookerjee, and find the same to be correct, and have signed the said account accordingly; the sum of Rs. 500 paid to us this day as earnest money; the further sum of Rs. 5,000 to be paid to us on the execution of the conveyance; and the sum of Rs. 4,000, the balance secured by a promissory note of the said Chundercaunt Mookerjee, payable to us or order three months after the date thereof." The execution of this document (which, it will be observed, is, in truth, no agreement at all, but a mere recital) is witnessed by the defendant's attorney, Mr. Hatch. Then comes a receipt, signed by the McQueens, dated the 14th October 1871, for Rs. 500, "on account of the consideration-money mentioned in the above agreement."

On the 25th of June 1872 an order was made by the Privy Council, reversing the decree of the High Court, with costs in the Courts below, in addition to the sum of £312-10-4 for the costs of the appeal. Subsequently the judgment in the *vasilat* suit was, on review, set aside, and the suit dismissed with costs.

On the 14th of September 1872 the Coondoos were restored to possession.

There is no doubt whatever that the whole of the proceedings in Court, from first to last, although

taken in the name of the McQueens, and with their consent, were taken under the instructions and at the expense of the defendant. Throughout, the McQueens may have assisted; but the strings were pulled entirely by the defendant.

The plaintiffs sue, alleging that, though they have eventually been successful in the Privy Council, and have been restored to the possession which they had before the litigation began, they have, in consequence of these proceedings, sustained a loss of about Rs. 25,000.

The plaint may be said to have two aspects. It says that the defendant was guilty of champerty and maintenance, and acted illegally in instituting and maintaining the suit, and that the litigation was commenced and upheld maliciously by the defendant in the names of persons who had no legal or equitable right, and without reasonable or probable cause.

I may say at once that I do not think it possible to support the plaintiff's suit, so far as it rests on the allegation that the original suit by the McQueens was brought without reasonable or probable cause. Whatever the result in the Privy Council may have been, it cannot be said that there was no reasonable or probable cause when a Division Bench of this Court actually decided in April 1869 in favour of the McQueens.

But the plaint also, after charging that the agreement entered in-

to by the defendant with the McQueens savours of champarty and maintenance, and is illegal and contrary to public policy, alleges that the litigation was instigated and carried on and conducted by the defendant at his own expense, and with a view to his own benefit, and that the defendant was the real mover in the proceedings, and unlawfully used the procedure and process of the Court to the damage and injury of the plaintiffs.

So far as the facts are concerned, there is no doubt that the litigation was entered into by the defendant in pursuance of the agreement of the 17th July 1867, and was instigated and carried on and conducted by the defendant at his own expense, and with a view to his own benefit, and that he was the real mover in all the proceedings which were had in the name of the McQueens. There is no doubt, too, that he used the procedure and process of the Court to the damage and injury of the plaintiff.

But was there anything illegal or against public policy in the agreement of July 1867, and the subsequent institution and maintenance of the suit by the defendant? And, even if there were, have the plaintiffs a good cause of action, when the suit was brought with the McQueens' consent, and was not brought without reasonable cause?

I was of opinion that the agreement which was the subject of the suit of *Grose vs. Amirtomoye Dossee*

(4, B. L. R., O. C., 1) was illegal and void as being against public policy (see pp. 46, 47, and 49-50), although I concurred with the Chief Justice, Sir Barnes Peacock, in giving effect to it so far as to treat it as a security for the repayment of all advances made, and interest at 12 per cent. For the same reasons which weighed with me in that case, I think that the agreement made by the defendant with the McQueens in 1867 was illegal and against public policy, as also were the subsequent institution and maintaining of the suit against the Coondos by the defendant.

The only substantial difference between the agreement in *Grose's* case and that which the defendant entered into, is that the terms of the latter are rather less unfavourable to the party in whose name the suit was to be brought. The defendant was to have had a clear profit to himself of only one-third of the nett proceeds after deducting costs of litigation and all his advances, with interest thereon at 12 per cent.; whereas *Grose* was to have had one-half of all that was recovered absolutely, and was to have had all advances made by him, and 12 per cent. thereon, out of the other half. The power of attorney given to the defendant was in reality, though not in express words, irrevocable. For when the deed starts with the recital that the McQueens had no means whatever, and when the evidence shows

that, in fact, they never paid a farthing towards the costs of this suit, and were persons without any means, it is impossible to attach any value to the provision in the deed of July 1867, which enabled the McQueens to revoke the power of attorney to the defendant on paying him Rs. 2,000 by way of liquidated damages, as well as all sums advanced by him, together with 12 per cent., or to the concluding power given by the deed to compromise, but which power was accompanied by a proviso that no compromise should be good which was not made with the defendant's consent, unless the amount realised by the compromise exceeded the total amount of the defendant's advances with 12 per cent. There can be no doubt that the agreement of July 1867 was practically irrevocable by the McQueens, and that it was all along intended to be so.

The view that such an agreement is against public policy and illegal is strengthened by the decision of the Madras High Court in the case of *Mulla Jaffarji Tyeb Ali Saib, vs. Yacali Kadar Bye* (7, Mad. H. C. Rep., 128); also by the recent decision of this Court in the case of *Soondurce Chowdrany, vs. The Court of Wards* (20, W. R., 446).

The question remains whether, under these circumstances, the plaintiffs have any cause of action, and can recover damages for the loss caused by the defendant's having, in pursuance of the

illegal agreement entered into by him in July 1867, instituted and maintained this litigation. The plaintiff alleges the defendant's conduct to have been malicious. But there was no special malice in the matter—no more than there always is, and must be (if malice it can be properly called at all), when a mere speculator takes up and prosecutes a suit.

In my opinion, this suit will lie. The case of *Pechell, vs. Watson* (8, M. and W., 691) is an authority that it will. It was there held that a suit would lie to recover damages for unlawfully upholding and maintaining an action by another against the plaintiff (*Pechell*), as also for unlawfully, and without reasonable and probable cause, instigating a pauper to commence an action, whereby the pauper did commence and prosecute the action. The case of *Pechell, vs. Watson* proceeded (as Lord Denman says in *Flight, vs. Leman*, 4, Ad. and Ill. N. S., 583) on the principle that to maintain an action already commenced was unlawful. The case now before me proceeds (so far as one portion of it is concerned) on the same principle. In *Flight vs. Leman* it was held that the action would not lie; but that was because it was for instigating another to commence and prosecute a suit, but neither showed *maintenance*, nor alleged want of probable cause.

The case of *Cotterell, vs. Jones* (21, L. J., C. P., 2) has been much

relied on for the defendant. But the only point actually decided there was that, as the plaintiff showed in his plaint that he could not possibly prove any legal damage, the suit was bad. The plaintiff in the original suit had been nonsuited, but the defendant in that suit (the plaintiff Cotterell) had omitted to get an order for the payment of his costs on the nonsuit. Therefore, the Court held that he could prove no legal damage, and that his subsequent suit could not be maintained. That case in no way shakes the authority of *Pechell vs. Watson*, so far as it decided that a suit would lie to recover damages for unlawfully upholding and maintaining an action brought by another.

The defendant has had notice from the first that the plaintiffs considered him liable for their costs. When the original suit was pending in the Court of the Judge of Hooghly, they applied to have him added as a defendant, in order that, if they succeeded in getting the suit dismissed, they might recover their costs from him. The Judge, however, refused the application, on the ground that the defendant had no present interest in the property in suit—concluding his observations on the point thus: “Therefore, in my opinion, he cannot be made a party to it, merely because he supplies funds for carrying it on, the terms of his agreement providing for the reimburse-

ment of his expenses, whether the suit fails or succeeds.” The Judge was in error when he supposed that the agreement provided for the reimbursement of his expenses if the suit failed. Under the agreement the defendant was entitled to be reimbursed nothing if the suit failed. In one event only was he to be reimbursed from any source save the proceeds realised by the suit—in the very highly improbable event, namely, of the McQueens paying back all monies paid or advanced by him, together with interest at 12 per cent., and Rs. 2,000 by way of liquidated damages.

The principle that those who maintain, and are the persons chiefly interested in the result of, suits instituted by them in the names of others, may be compelled to recoup to the defendants who are sued the costs incurred by them in defending themselves, has been frequently recognized and acted on in this Court. See *Bama-soondery Dossee, vs. Anundolall Doss* (Bourke’s Reports, 45, O. C. J.), and again (in appeal) at p. 96. (The report of this case at p. 96, I may remark in passing, is not very accurate. Among other things, it represents me as being one of the Judges who heard the appeal. This is a mistake, for the Appellate Court consisted of the Chief Justice and Mr. Justice Norman only.) And something of the same principle is to be found in such cases as *Hilton vs. Woods* (L. R., 4 Eq., 432), and

In Re Jones (L. R., 6 Chanc. 497), though in cases of the latter class a good deal turns on the fact of the persons whom it was sought to make liable for the costs being attorneys on the record.

Apart from all precedent, and even if it were doubtful whether the agreement of 1867 were actually illegal and void, it seems to me to be perfectly fair and just that, in a case such as this, the defendant should be held responsible to the plaintiff for the loss he has sustained by reason of the suits which the defendant (substantially only for his own benefit) has maintained against him.

It is said that this suit is barred by limitation. But there is no ground for any such contention. The plaintiffs could not have successfully sued until the case was decided in their favour by the Privy Council.

The damages recoverable from the defendant are those which might have been recovered from the McQueens had they been persons of means, and the defendant had not intermeddled in the suit. Security has been given to a certain extent for the costs of the appeal to the Privy Council. It was argued that, because that security was given, the plaintiffs are now limited to the amount for which it was given, and also that they cannot recover from the defendant until they have proceeded against the security, and failed to recover. In my opinion,

the plaintiffs are neither limited to the amount for which security has been given, nor bound to proceed in the first instance against the security.

I think the plaintiffs are entitled to recover the Rs. 4,739 which they had to pay the McQueens as costs after they succeeded in their appeal to the High Court; also the sum of Rs. 124, then due from the McQueens to the Coondos, and which was credited to them, so as to leave the balance due by them Rs. 4,739. Mr. Phillips objects to this item of Rs. 124 being allowed. But the plaintiffs are clearly entitled to it. It was due to the Coondos at the time execution issued against them, and the sum of Rs. 4,739, actually levied from them, was the balance due after giving them credit for this item of Rs. 124. As matters stand, the plaintiffs never have been paid that sum of Rs. 124, and, under the circumstances, are entitled to recover them now. Then there are the plaintiffs' own costs, Rs. 892-14 and Rs. 758. Interest at 13 per cent. (being the rate allowed as against the Coondos both in the Court of first instance and in this Court) is to be allowed from the dates on which the amounts were paid by, or became payable to, them.

As regards the appeal to the Privy Council, the plaintiffs are entitled to Rs. 1,551-8-2, the amount paid by them to the High

Court for furnishing and transmitting records, &c., also to £312-10-4 allowed expressly by the Privy Council, which at par is Rs. 3,125-0 2. Then there are Rs. 16 for infructuous attempts to execute the decree of the Privy Council against the McQueens; and Rs. 1,224-7-3, the costs allowed in the *wasilat* suit on the review of judgment, &c. On all these items I shall allow interest at the rate of 6 per cent.

I do not think that the extra costs incurred either in England, or to Messrs. Beeby and Rutter here, in connexion with the appeal, are recoverable in any shape.

Under the head of *wasilat* for the time he was out of possession (during which time the defendant was in actual possession and enjoyment of the rents), I shall allow Rs. 150 a month, with interest at 12 per cent. on each item. There is no reason why such interest should not be recovered by the plaintiffs, seeing that the defendant, in this *wasilat* suit against them, charged them, and obtained a decree at that rate.

There will be a decree accordingly for the plaintiffs with costs on scale 2.

Attorney for the plaintiffs, Baboo Radhanath Bose.

Attorney for the defendant, Mr. Hatch.

PRIVY COUNCIL.

THE 3RD FEBRUARY, 1874.

Appeal from Oudh Judicial Commissioner's Court.

RANI MEWA KUWAR, vs. RANI HULAS KUWAR.

Estoppel—Limitation.

The nature of an estoppel being to exclude an enquiry by evidence into the truth, those who rely upon a document as an estoppel, must clearly establish that it does amount to that which they assert.

When a compromise is based on an assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is, a claim under that compromise, does not rest on contract only, but upon a title to the land acknowledged and defined by the contract, so that a suit founded on the compromise is not founded on contract or for a breach of it but that it is a suit for the recovery of immoveable property, consequently the proper limitation of the suit is 12 years.

This is a suit brought by Rani Mewa Kuwar, the grand-daughter of Rajah Ruttun Singh, against Rani Hulas Kuwar, the widow of Khyratee Lall, who was a grandson of the Rajah, to recover $8\frac{1}{2}$ annas share of three houses and an Imambara situate in the city of Lucknow. The appellant claims $4\frac{1}{4}$ annas in her own right, and $4\frac{1}{4}$ as the representative of her deceased sister, Chattur Kuwar.

The claim arises in this way:—The property in dispute, which is in Oudh, belonged, with other considerable property in Rohilcund,

to Rajah Ruttun Singh, who died in 1851. It is said that he became a Mahomedan, and that, according to Hindoo law, his ancestral property thereupon vested in his son, Dowlut Singh, the father of the appellant, and her sister. Dowlut Singh died before his father, and in consequence of his having so pre-deceased him, and having no male issue, the property of the Rajah Ruttun Singh would have descended to the grandson. Khyratee Lall, whose widow, Hulas Kuwar, is the defendant and present respondent, unless the conversion of the Rajah, and the consequent vesting of the estate in Dowlut Singh, was established. The defendant raised a further question, namely, that the property of Rajah Ruttun Singh had been confiscated by the King of Oudh, and had, after the Rajah's death, been granted by the King as an act of grace to his widow, Rani Raj Kuwar, and that on her death it descended to Khyratee Lall as her legal heir. It appears that questions arising out of this alleged conversion to Mahomedanism of the Rajah, and respecting the confiscation, were contested between the widows of the deceased Rajah Ruttun Singh and of his son, Dowlut Singh; and after their deaths the controversies were renewed between Khyratee Lall and the respondent and her sister. After these controversies, and avowedly to put an end to the dis-

putes, a compromise was effected between the parties, the terms of which are found in what is described as a deed of agreement of the 21st July 1860. It is essential to the determination of the questions in this appeal to consider what is the effect of this agreement, and of a subsequent one which was entered into at a later period of the same year, namely, on the 12th of November.

The first agreement is made between the contending parties, Khyratee Lall, and his consins, Rani Chattr Kuwar, and the present appellant, Rani Mewa Kuwar, the daughters of Dowlut Singh. It is this: "We" describing the parties "do hereby declare that, regarding the dispute which existed for all the houses, lands, and property left by Rajah Ruttun Singh, deceased, whether moveable or immoveable, ancestral, or self-acquired, in the custody of the Court of Wards, situated in the district of Bareilly, Pilibhit, Shahjehanpore, Badaon, &c., and in the province of Oudh, we have, whilst in the perfect enjoyment of our senses, and without being under any kind of compulsion or coercion, come to amicable terms in the presence of Mr. John Inglis, Collector of Bareilly, and agreed to regard the whole property as if it were one rupee, and to divide it into the following shares: $7\frac{1}{2}$ annas as the share of Khyratee Lall, $4\frac{1}{4}$ annas as the share of Rani Chattr

Kuwar, and $4\frac{1}{2}$ annas as the share of Rani Mewa Kuwar." That is an agreement that the whole property left by the Rajah Ruttun Singh, as well that in Rohileund as that in the province of Oudh, shall be divided in those shares. Then comes a provision for a division of the property, according to those shares, by a partition by metes and bounds. That part of the agreement is this: "According to these rates the whole of the property shall be divided amongst the above, agreeably to a punchait to be convened for the purpose. That we shall not retract from this proposed division;" and then declaring that it should be a final agreement between them. It is undisputed that this agreement relates to the whole of the property of Rajah Ruttun Singh, as well that in Oudh as in Rohileund. In fact that is the case on the part of the respondent as well as that on the part of the appellant. Both agree that this agreement was intended to settle the disputes relating to the whole of the property left by the Rajah. Now there is no evidence to be found in the record of an actual partition of the property, either in Rohileund or in Oudh, pursuant to the terms of this agreement; but it is said on the part of the respondent, the defendant, that by the subsequent agreement, to which I have alluded, of the 12th November 1860, there is an acknowledgment on the part of the present ap-

pellant and her sister whom she represents, that a partition had taken place of the whole property, as well the property in Oudh as in Rohileund, an acknowledgment which binds them by way of estoppel; and that, under those circumstances, the present claim of the appellant to a share of the houses in Lucknow must be defeated. This document is in ambiguous language, and some care is required in considering what is the effect of the language used in it. It may here be said that those who rely upon the document as an estoppel,—the nature of an estoppel being to exclude an enquiry by evidence into the truth,—must clearly establish that it does amount to that which they assert. Now the document is this: "We Khyratee Lall in person," and the appellant and her sister by their attornies,— "the principals, being heirs of Rajah Ruttun Singh, deceased, do hereby declare that—Whereas our case regarding rendition of accounts and division of the property left by Rajah Ruttun Singh, now in charge of the Court of Wards, was pending before Moulti Mahomed Khyrooddeen,"—and other persons, naming them, and describing them "as members," and their lordships understand that they were a committee of persons, or a punchait, appointed to make a partition. The document goes on, "the same has now been amicably adjusted and divided amongst our-

selves, according to our specific shares,"—that is, the shares mentioned in the first agreement,—“under the auspices of Mr. John Inglis, Collector of Bareilly, and the division, under the blessings of Providence, having been made accordingly regarding the whole property, viz. cash, furniture, villages (mortgaged and free from mortgage) houses and shops, cash deposited in banks and treasury, other property moveable of every description, and books, we have received our respective shares. Now there is not the slightest dispute amongst us left unadjusted and unsettled, and there is not a fraction of such property which has not been divided amongst us. We have therefore filed this razeenamah, acknowledging division of property and settlement of accounts in the court of the above mentioned deputy collector, that it may prove of use hereafter.” There are undoubtedly words in this agreement which, taken by themselves, are sufficient to comprehend the whole of the property which was the subject of the first agreement; but the words which occur in the commencement of the agreement appear to their lordships to be the governing words of the instrument, as far as the property included in it is concerned, and those words are: “Whereas our case regarding rendition of accounts and division of the property left by Rajah Rattun Singh, now in charge of the Court

of Wards.” Now the only property which could have been in charge of the Court of Wards was the property in Rohilkund. Notwithstanding therefore the large words to which I have referred, viz., “Now there is not the slightest dispute amongst us left unadjusted, and unsettled, and there is not a fraction of *such* property which has not been divided amongst us,” their lordships think that the reference made in that wide clause by the words “such property” limits its application to the property described in the commencement of the agreement, namely, the property “now in charge of the Court of Wards.” Undoubtedly there is some room for the contention that the words “now in charge of the Court of the Wards” were not intended to limit the agreement to property which was really in the Court of Wards, but were inserted by mistake and by misapprehension of the parties might have thought that the property in Oudh was in charge of the Court of Wards of the district of Bareilly. Their lordships do not fail to notice that property was described as being in the custody of the Court of Wards in the first agreement, but there the description is not confined to property in the Court of Wards, but the words “and in the province of Oudh” are inserted, apparently for the purpose of showing that the agreement was intended to comprehend lands in that province as well

as those in Rohilcund. There are no such words in the agreement of November, and upon the whole their lordships think that that agreement may properly be confined to the lands in Rohilcund which were really in charge of the Court of Wards.

It will be observed from what has been already said that their lordships have felt that this document is ambiguous, and this being so, the construction of it may be aided by looking at the surrounding circumstances. If it had appeared that the appellant had had possession for a long number of years of some property which had belonged to Rajah Ruttun Singh in Oudh, and the respondent and those she represents had been in possession of other property which had belonged to the Rajah, it might have been inferred that a partition had been made by agreement, and the parties were content to hold what they had so agreed to take without any formal partition by a punchait. But upon looking at the circumstances which were relied upon by the respondent's counsel, Mr. Cave, to support that presumption, it appears to their lordships that they fail to do so. The first circumstance relied on was that in addition to the four houses which are the present subjects of dispute, there was a fifth house which, it was said, had belonged to Rajah Ruttun Singh, and had been in the possession of the appellant and her sister and her sis-

ter's husband. But the evidence when examined really fails to make out that that house was a part of the property of Rajah Ruttun Singh. On the contrary, there is a great deal of evidence to show that it was the separately acquired property of Dowlut Singh, the father of the appellant, and was no part of the estate of the Rajah. The title to that house is, at least, left in doubt, and it was for the respondent, if she relied upon the circumstance of the appellant's having the ownership and possession of the house as presumptive proof of the partition, to have shown clearly that it formed part of the property of the Rajah.

The other circumstance strongly relied on was that there had been an acquiescence of nine years, from the date of the agreement in 1860 to the commencement of this suit, in the possession of the four houses now claimed remaining with the respondent. But again upon investigation their lordships think that there was no acquiescence from which they could safely presume there had been a partition. It seems that upon the death of the appellant's sister, Rani Chattru Kuwar, the appellant brought a suit against her husband, Oudh Beharee Lall, to recover from him her sister's $4\frac{1}{4}$ share in the houses now in dispute. That suit was commenced apparently in the year 1866. The defence to it was that Beharee Lall was entitled to the

property in another right,—it is not necessary to say what right he set up. The present appellant succeeded in that suit in the lower Court, and also upon appeal in the High Court of the North-West Provinces. Now in that suit she claimed, as against her deceased sister's husband, her sister's share in this very property. It seems incredible if she was aware she and her sister had no right to this property, and that it had gone under a partition to Khyratee Lall, that she should have instituted that which would have been, so far as regards this property, an entirely useless suit. It is perfectly true that nothing which occurred in the progress of that suit can be evidence against the present respondent, who was no party to it; but the suit is so far material and relevant that the present appellant, having obtained a decree against the sister's husband, Oudh Beharee Lall, endeavoured to execute that decree by obtaining possession in due course of law of the houses, and was resisted by the present respondent who was then in possession of them. These facts seem to negative anything like acquiescence on the part of the appellant in a supposed partition by which these houses were allotted and assigned to be held in severalty by the respondent or by Khyratee Lall whom she represents.

Under these circumstances the case simply comes to the question

of the right of the appellant under the agreement of July 1860. That agreement assumes that the parties were severally claiming, by virtue of some right of inheritance, the property of the Rajah Ruttun Singh; that there were questions between them which might disturb the rights which each claimed, and it was better instead of a long litigation to settle these rights, and they do settle them by arriving at this agreement, which provides that the property shall be held in certain shares, and shall be divided according to those shares. A partition according to those shares has never taken place, and the respondent is in possession of the entirety of the houses in Oudh and the Imambara. Unless therefore the title of the present appellant is barred by limitation she has, in their lordships' opinion, a right to a decree for the shares of those houses assigned to her and her sister whom she now represents by the agreement.

Their lordships, in coming to this conclusion, have arrived at an opinion in accordance with that of the Judicial Commissioner, from where this appeal comes to Her Majesty. The Judicial Commissioner states that he has no doubt that the agreement of November 1860 did not include the property in Oudh. He says, "I shall have to refer again to the agreement effected by the disputants in July 1860. I deem it necessary to re-

cord my concurrence in the ruling of my predecessor in regard to the deed of November 1860. It is clear from the terms of that document that it referred solely to that portion of the property of the late Rajah Ruttun Singh that was situated within the jurisdiction of the Collector of Bareilly. It sets forth that—'Whereas our case regarding rendition of accounts and division of the property left by Rajah Ruttun Singh, now in charge of the Court of Wards, was pending before certain arbitrators, an amicable adjustment has been made and the whole property divided.' The property situated in the province of Oudh and claimed in the present suit was not under the charge of the Court of Wards of the Bareilly District, and could not therefore have been included in the division referred to in this document." So far, therefore, their lordships entirely agree with the judgment of the Judicial Commissioner. The way the case came before him ultimately was this: the Civil Judge of Lucknow having at first decided, contrary to the above view of the Judicial Commissioner, that the agreement of November 1860 did include the Oudh property, and was an estoppel, was overruled by a former Judicial Commissioner, Sir George Cowper, who remanded the case for an enquiry as to the possession of the houses. The Civil Judge on this remand seems to have thought he must inquire

who had had possession during the last 12 years, and finding that the respondent and her predecessors had been in possession for more than 12 years, he held that the suit was barred by the Statute of Limitations.

The Judicial Commissioner, when the case came before him on final appeal, held that the claim of the appellant was based on the agreement of July 1860, and that limitation only ran from that date; but he thought the limitation of six years was applicable to the suit. The judgment of the Judicial Commissioner was that the case of the appellant rested upon the agreement of July 1860, and that so resting upon a contract the case was within the 10th clause of section 1 of Act 14 of 1859, and barred by it, inasmuch as the action was not brought within six years from the date of that agreement. Now their lordships are of opinion that the 10th is not the clause which is applicable to the present claim, but that the suit is really brought for the recovery of immoveable property, and that the clause which properly applies to it is clause 12 of section 1. The compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is. The claim does not rest on contract only, but upon a title to the land acknowledged and defined

by the contract, which is part only of the evidence of the appellant to prove her title, and not all her case. It therefore seems to their lordships that the suit is not founded on contract or for a breach of it, but that it is a suit for the recovery of immoveable property "to which other provision of the Act applies," and so within clause 12; consequently, in their opinion, the proper limitation of the suit is 12 years, and it has not been contended at the Bar that if that be the period of limitation the present suit is barred.

For these reasons their lordships, agreeing in the view of the merits of the case taken by the Judicial Commissioner, but differing from him as to the effect of the Statute of Limitations, must humbly advise Her Majesty that his judgment ought to be reversed, and that a decree ought to be made that the appellant is entitled to the possession of the $8\frac{1}{2}$ annas share of the properties in Oudh, the subject in dispute in the suit. The appellant to have the costs in India and of this appeal.

CALCUTTA HIGH COURT.

The 15th December, 1873.

THE QUEEN,

*versus*MADHUB CHUNDER GIRI MOHUNT,
*Appellant.**Prosecution by a Convicted Person*
—Adultery—Evidence.

There is no rule that a convicted person cannot institute criminal proceedings.

In a case of adultery, sexual intercourse must be proved; the sexual intercourse required for adultery being the same identical thing as the sexual intercourse required for rape.

It is not necessary that there should be direct evidence of an act of adultery, nor that the adulterer should know whose wife the woman is, provided he knew she was a married woman.

The High Court declined on appeal to receive evidence which was available at the trial below, when the prisoner deliberately elected not to give evidence in reply to the case made against him.

Per Markby, J.—It is not the duty of the High Court in appeal to try a prisoner *de novo* upon the recorded depositions: the Court is bound, in forming its conclusions as to the credibility of the witnesses, to attach great weight to the opinion which the Judge who heard them has expressed upon that matter.

MARKBY, J.—In this case the prisoner is charged under Section 497 of the Indian Penal Code with having committed adultery with one Elokeshi, the wife of Nobin Chunder Banerjee.

Nobin Chunder Banerjee is now under sentence of transportation for life for having killed his wife, Elokeshi, on account of her infidelity.

The Sessions Judge has convicted the prisoner and sentenced him to three years' rigorous imprisonment and a fine of Rs. 2,000. One assessor concurs in this verdict, and the other does not.

The case is one of considerable public importance on account of the position of the prisoner, who is the Mohunt of Tarokeshur, said to be one of the holiest and wealthiest shrines in this part of India. The person with whom he is charged to have committed adultery was a Brahmin woman, married to a husband of the same rank as herself.

The case comes before us on appeal, and I will first dispose of one or two points of law which have been raised in the prisoner's favor.

It is contended that Nobin Chunder Banerjee, being a convicted person, cannot prosecute. This argument is founded on the rule which prevails, or did prevail in England, that certain infamous persons could not become prosecutors. But though the Criminal Procedure Code speaks of a prosecutor in some cases, there is no prosecutor on a criminal trial in this country in the English sense. The prosecutor in England is the person who prefers the bill of indictment before the Grand Jury, and, generally, without his appearance no bill can be found. But the prosecutor in India is merely the person who, by making a complaint and by giving information,

institutes the proceedings over which, as a general rule, he has subsequently no control, and in which his concurrence is in no way necessary. Whether or no the husband who has instituted proceedings in adultery, has any control over them subsequently by reason of the provisions of Section 478 of the Code of Procedure, is to my mind a matter of very serious doubt; but it is not necessary to consider it in this case, because there never was any rule, as far as I am aware, that a convicted person could not institute criminal proceedings; and that is all that in a case of adultery the husband is required to do.

Next, it is contended that the husband, after he became aware of his wife's misconduct, condoned the offence, and was thereby incapacitated from instituting these proceedings. No authority has been cited for this contention, nor do I know of any principle on which it could be based.

Another objection was taken that such sexual intercourse as is necessary to adultery was not established. I shall consider hereafter the general effect of the evidence and what it establishes. What the law in terms requires is that sexual intercourse shall be proved; and the sexual intercourse required for adultery is, in my opinion, the same identical thing as the sexual intercourse required for rape.

Lastly, it was said that evidence had been improperly rejected. The evidence which the Judge was asked to receive was an account of what a person named Mohesh Bharatee had stated as to the custom of females visiting shrines of this description. The witness appears to have absconded and could not be produced at the trial, and the evidence was tendered under Clause 4 of Section 32 of the new Evidence Act. The Judge in my opinion has rightly rejected it; and I may also add that even if admissible, it would, in my opinion, be absolutely worthless.

Mr. Jackson has also, in this appeal, tendered evidence on behalf of the prisoner, but we declined to receive it. The evidence tendered was available at the trial, when the prisoner deliberately elected not to give any evidence in reply to the case made against him. I think he must abide by that election.

I now come to the more important part of the case, namely, the consideration of the evidence by which the prisoner's guilt is sought to be established. There can be no doubt whatever that upon this appeal the whole facts are open to us; but inasmuch as there has been some argument at the Bar as to what the duty of the Court is in dealing with such an appeal, I wish to state that in my opinion it is not the duty of the Appellate Court to try the prisoner *de novo* upon the recorded depositions. I

consider that in dealing with the question of credibility of oral testimony (which in this as in almost every other criminal case is the really important question to be determined) we ought to place very great reliance on the opinion of the Judge who had the witnesses before him ; who saw their demeanour ; who heard the questions put to them ; and who also heard their answers given in their own language. A mere record in another language and in a narrative form is but a very imperfect representation of what passes between a witness and Counsel, more especially in cross-examination. For these reasons all Courts of appeal, whether civil or criminal, do rely very much on the opinion formed by the Court of original jurisdiction, and, in this case, I intend to adopt that principle. Of course, we must satisfy our own minds of the guilt of the prisoner : otherwise we must acquit him. But we are at liberty and, in my opinion, we are bound in forming our conclusion as to the credibility of the witnesses, to attach great weight to the opinion which the Judge who heard them has expressed upon that matter.

The offence of adultery is defined by the Code as having sexual intercourse with a person whom the adulterer knows, or has reason to believe, to be a married woman. There can be no doubt that Elokeshi was a married woman, and the two questions to be considered

are whether the prisoner had sexual intercourse with her, and whether he knew, or had reason to believe, that she was married.

The evidence which goes to establish the sexual intercourse is that of Gopeenath Singh Roy, Ramessur Pattro, and Ooma Churn. Gopeenath Roy was, until this case arose, a servant of the Mohunt. He states that he has frequently seen Elokeshi at the Mohunt's private residence, which is at a short distance from the temple, at 9 and 10 o'clock at night, and also coming away from the house in the morning ; that these visits were at intervals of three or four days, and lasted for about a year, being continued up to the month of Jeyt last which is the month in which Elokeshi was killed by her husband. He says he saw the Mohunt alone with Elokeshi in his sleeping apartment, at the bathing ghât, and at the top of the house ; that she was a modest looking woman, 14 or 15 years of age, and wore a bordered sharree, bracelets on her arms, and anklets on her feet ; that she had a red mark on her forehead, and her hair was tied. He had seen Elokeshi come accompanied by her younger sister Muktakeshi and a servant named Telibo : he had seen the three go up to the house ; the former go in, and the two others go away.

Ramessur Pattro says that in Bysack (April last) he went to the Mohunt, who is in the habit of

lending money, to borrow Rs. 16 to pay his rent ; that he went to the Mohunt's private residence in company with Chand Mohun, the Mohunt's jemadar, and that as he was standing at the top of the stairs outside the room in which the Mohunt was, he saw through the open door Elokeshi sitting on the bed and talking with the Mohunt ; that she was about a cubit distant from the Mohunt, and there was no one else in the room : the Mohunt gave her a slap on the back, whereupon she ran into another room out of his sight. The room in which they were sitting was not a bed-room, but a sort of large anteroom, out of which several rooms opened ; amongst others, the Mohunt's bed-room.

Ooma Churn says that on Sunday, the 7th or 8th Bysack (meaning, probably, Sunday, the 20th of April, which corresponds with the 9th of Bysack Bengalee and 8th of Bysack Fuslee) he saw Elokeshi at Tarokeshur at the Mohunt's cow-house with Telibo at about 4 or 5 o'clock in the evening ; that he spoke to her, and that she said she was going to the festival. She then went in at the private door at the west of the Mohunt's private house with Telibo.

The first consideration upon this evidence is its credibility. The first assessor does not believe that Elokeshi was at the Mohunt's house at all, evidently, therefore, disbelieving all three witnesses. The

second assessor is satisfied that Elokeshi was at the Mohunt's house for an immoral purpose, and that with the Mohunt ; and this assessor has therefore accepted some, if not all, of this evidence. The Sessions Judge has accepted the whole of this evidence as substantially true. He says as to the most important witness of all, Gopeenath Roy :—" I have very carefully considered the evidence of this the most material witness in the case, and have duly weighed the arguments urged against his credibility by the learned Counsel for the defence, and the conclusion at which I arrive is that the testimony of Gopeenath as given before this Court is to be believed ; and I do believe it." The very serious objection to Gopeenath Roy's evidence is, that on one out of the several occasions on which he was examined he wholly withdrew his statements. That withdrawal he now explains by stating that he acted under the persuasion of the Mohunt and his dependants, and he tries to excuse himself by saying that he was drugged and did not know what he was saying when he was examined on that occasion. There cannot be a doubt that the evidence of such a witness must be looked upon with very great suspicion, and that to support a conviction it ought to be corroborated.

Now it appears to me that this evidence is so corroborated. I can

see no substantial reason whatever for not accepting the evidence of Ramessur Pattro, and he describes a scene which appears to me to correspond entirely with the evidence of Gopeenath Roy. What Ramessur Pattro describes, I think is just what would be likely to occur between a man in the Mohunt's position and a woman who was a habitual visitor to the house, and not what would be likely to have occurred had this been the woman's first and only visit. If, therefore, this evidence be accepted, it seems to me to corroborate generally the evidence of Gopeenath. And besides that there is nothing directly to impeach the credibility of this witness, the story itself is sufficiently precise in time and circumstance to render it exceedingly dangerous to the witness to have stated it, if it is not true. It is a story capable of being contradicted in several particulars, and especially it is capable of being contradicted by one at least of the Mohunt's own servants.

The evidence of Ooma Churn ought, as it appears to me, also to be accepted, and though it does not go near so far as that of the two other witnesses, it does at any rate establish that Blokeshi did visit the house of the Mohunt under circumstances calculated to excite very strong suspicion. A Mohunt has no zenana, and ought to have no intercourse with women whatever.

But it is said that for the very reason that the prisoner is a Mohunt, his conduct is to be more favorably construed; that that which would be inadmissible in the case of any other person is admissible for him; and that women can and do approach him, even in his private apartments, for the purpose of making obeisance to him. In my opinion there is nothing in the evidence which countenances such a statement. I should be loath to believe that there existed so much laxity in the Hindoo community without very clear testimony; and here the testimony is, in my opinion, the other way. The Sessions Judge has said that it may readily be conceded to the defence that women do go, as a matter of fact, to the Mohunt in his private rooms for the purpose of making obeisance, although the practice is not strictly proper or warranted by the requirements of Hindoo ideas. But this can only be a concession for the purpose of argument. As regards this particular shrine, the evidence is that women do *not* visit the Mohunt in his private apartments. Ooma Churn, who speaks to the general practice, admits that elderly women, one or two, do go; but taking his whole evidence together, I think it clear that he denies that it is proper for respectable women to do so. Both sides have appealed upon this subject to common knowledge and experience. I cannot venture to speak from ex-

perience, but from every enquiry which I have made, and from all that I have been able to learn upon the subject, I have no doubt whatever that for young Bengalee woman to be seen alone in the private apartments of a Mohunt is as utterly destructive of her character as it would for her to be seen alone in the private apartments of any other man out of her own immediate family. I say this because social rules of this description ought not to be lightly disturbed or doubted: but at the same time it is scarcely necessary to add that this suggestion, even if well founded, does not explain away the evidence of Ramessur Pattro, and, of course, does not approach to an explanation of that of Gopeenath Roy, if that evidence be accepted.

It has been suggested that the prosecution is due to the enmity of one Bholanauth Roy, and that all the witnesses are connected with Bholanauth Roy. This person appears to be a zemindar of considerable property in and about Tarokeshur, and it would not be difficult therefore to trace some remote connection between him and the witnesses. But there is nothing to justify an inference that Bholanauth has taken any part in these proceedings, or used his influence in any way whatever; and the Sessions Judge has, I think rightly, refused to accept this suggestion.

Again it is said that the woman

may have had an intrigue with some one at the Mohunt's house but not with the Mohunt, and it is pointed out that the prosecutor in the first instance charged one Kinaram with adultery as well as the Mohunt, and that Kinaram has absconded. But, as the Sessions Judge points out, the evidence, if believed, fixes the guilt on the Mohunt, and not on Kinaram. Not one of the witnesses speaks of having seen Elokeshi in the company of Kinaram, and there is in my opinion no pretence whatever for saying that the room where Ramessur Pattro saw her was in any sense the room of Kinaram. It was the room of the Mohunt, though not the room in which he usually slept; and whether Kinaram or any one else may on some occasions have slept there, seems to me to make no difference. The importance of this piece of evidence does not depend on the particular room where the Mohunt and Elokeshi were found, but upon their being found together and alone in a room in the Mohunt's private house.

Much has been said against the inferences drawn by the Sessions Judge from the fact that the prisoner has called no witnesses to disprove the case made against him. The strength of the inference which can be made from this omission as to the truth of the facts stated varies in every case. In the case of Ramessur Pattro, and the inci-

dent which he relates, I think it is a matter of observation that no attempt has been made to contradict him. As regards the conversation which Gopeenath Roy alleges that he had with the prisoner about waylaying the prosecutor and preventing him from taking away Elokeshi, I do not think the prisoner could be reasonably expected to contradict it. As regards the means said to have been used by the prosecutor's servants to prevent Gopeenath Roy from giving evidence, I think the Sessions Judge was justified in making some observations on the circumstance that none of their servants have been called. I confess I do not understand the argument that because the statement made implicates them in a crime, therefore it is useless to call them to deny its truth. It is said that Mr. Stephen uses a somewhat similar argument in his Introduction to the Indian Evidence Act, page 46. But I must say that it seems to me a most extraordinary doctrine that because an infamous charge is made against a man it is useless to call him to deny it; and that whether he appears in the witness-box and denies it on oath and is submitted to cross-examination, or whether he remains silent, cannot afford any criteria as to his guilt or innocence. The whole practice of civil and criminal trials in which persons are constantly put forward at great expense, trouble, and inconvenience to deny

such imputations, seems to me against such a notion.

Then it is said that familiarity, even culpable familiarity, does not constitute adultery, and that even if full credence be given to the witnesses, they do not establish conclusively the fact of sexual intercourse. It is contended that actual sexual intercourse must be proved and cannot be presumed, and that penetration ought to be proved. I have already said that this must be proved, but I know of no law in this country which requires any particular kind of proof of adultery, or which recognizes any different degrees of proof in different cases. Differences in the proof required of the same fact in different cases very often arise out of the circumstances of the case. You can hardly presume sexual intercourse in a charge of rape, because by the hypothesis one of the parties is doing her best to prevent the act. The hypothesis in adultery is precisely the reverse, and the evidence differs accordingly. I know of no authority for saying that the evidence of sexual intercourse must be stronger on a charge of adultery than in a suit for a divorce. The best proof available must always be produced, but in both cases evidence of opportunities sought for and obtained, and of familiarities which point strongly to an inference of guilt, are sufficient to establish the fact of sexual intercourse. I think it is impossible to interpret

the facts deposed to in this case in any other way than as indicating that there was sexual intercourse between these persons very frequently repeated.

I fully concur, therefore, with the Sessions Judge in finding that the prisoner committed adultery with Elokeshi; but in order to constitute the offence under the Indian Penal Code, it is necessary that the prisoner should have known, or should have had reason to believe, that she was a married woman. There is not the least doubt that by the dress she wore she distinctly asserted herself to be so. The insignia of marriage, as they have been called, are much more obvious and much more marked in the case of Hindoo women than with us. Still it is said that a prostitute may adopt these insignia in order to conceal her disgrace, and I am not prepared to say that this might not be done. If, therefore, this was the case of a man meeting and cohabiting with a stranger, I should not infer knowledge in the man from the mere fact of the woman's wearing the peculiar dress of a married person. But the case before us is a very different one. Elokeshi seems to have been a person well known in the neighbourhood of Tarokeshur; her intercourse with the prisoner was long continued, and the witnesses say that she was a modest looking person, and not likely

therefore to be mistaken for a prostitute. I quite concur with the argument for the defence that this part of the case requires to be fully proved; and that it was not intended to punish fornication in one case more than another, but only to punish those who knowingly choose for their gratification the wife of another man; though I cannot accede to the argument of Mr. Jackson that it is necessary that the adulterer should know whose wife the woman is. In my opinion it is sufficient if he knows that she is married; and I think it may fairly be presumed, from all the circumstances of the case, that the prisoner must have discovered, if not before, at least at an early period of his cohabitation, that Elokeshi was a married woman, unless there were some very peculiar circumstances which led to his being deceived, of which, however, he makes no suggestion. The prisoner has all along remained absolutely silent. In my opinion, therefore, this element in the crime of adultery has also been established against the prisoner. The punishment inflicted is severe, but I do not think it ought to be mitigated. It is a lesson which it is always desirable to enforce, that if persons who profess special sanctity so far forget themselves as to commit infamous crimes, they may have to incur a specially severe punishment.

The appeal is dismissed.

Promissory Note payable by Instalments
—Cause of Action.

When two or more instalments of a promissory note, payable on the face of it by instalments, are due, the holder of the note is not at liberty to sue separately for each instalment, or for some of them; he must sue for all the instalments due in one action. A judgment recovered in a suit for one instalment when others are due is a bar to a suit subsequently brought for the latter—C. H. C. (Couch, C. J. and Glover J.)—14th August 1873—H. Mackintosh—XII. B. L. R., 37.

Right of Occupancy—Zemindar and Ryot
—Ryot's power to transfer—Mesne profits.

A right of occupancy, which is not transferable, is merely a right on the part of the person entitled to it to occupy and till the soil either by himself or by persons dependent on, or subordinate to, him, *e. g.*, his servants, lessees, or licensees. Therefore, where a non-transferable right of occupancy was transferred, and the transferee was in actual possession of the soil, tilling and using it for his own benefit: *Held* that the Zemindar had a right of suit against the transferee to recover possession of the land. He was also entitled to recover as damages so much of the Zemindar's rents and profits as the de-

fendant had, while in possession, been the means of preventing the Zemindar from receiving—C.H.C. (Phear and Ainslie, J. J.) the 4th June 1873—Bibee Sohodwa—XII., B. L. R., p. 82.

Will—Construction—Absolute Estate.

An Armenian by his will in the Bengali language made a gift to his son in the following terms:—"I bequeath to A as *Salamati* my talooks (which he named) and Rs. 6,000 in cash. He shall enjoy the profits of the aforesaid talook. On his demise his sons shall get. The mook-tears shall make over to the satisfaction of A." *Held* that the will was to be construed according to equity and good conscience, and not according to English law. The rule applicable was that, unless a contrary intention appeared, the estate given was an absolute one. A took an absolute estate under the devise—C. H. C. (Couch, C. J., Glover and Mitter J.J.)—The 14th February 1873—L. P. D. Broughton—XII., B. L. R., p. 74.

Award of Arbitrators—Judgment according to Award—Act VIII. of 1859, S. S. 324 and 325.

A suit in the Moonsiff's Court was, after issues had been settled and evidence on such issues adduced by both parties, referred

by consent of parties to arbitration. The arbitrator made his award, and on the next day an order was recorded by the Moonsiff that the parties were to file their objections to the award in one day, notwithstanding that S. 324, Act VIII. of 1859, allows the parties ten days for such purpose. The plaintiffs, in accordance with that order, filed a petition of objection to the award, and an order was endorsed by the moonsiff on this petition, that it should be laid before the Court with the papers of the arbitrator. The Moonsiff then gave his judgment in which he went into the evidence, and over-ruling the objection of the plaintiffs, gave a decision on the merits, which decision was in accordance with the award: *Held*, that such judgment, though in accordance with the award, was not final under S. 325 of Act VIII. of 1859, but was open to appeal. In order to make it final, it should appear that all the proceedings have been regular, and the directions of Act VIII. of 1859, complied with—C. H. C. (Couch, C. J. and Glover, J.)—29th July 1873—Gunganarain Ghose—XII., B. L. R., p. 48.

Joint Property—Right of co-sharers—Alteration of Joint Property by one Share without consent of his co-sharers—Injunction.

One of several co-sharers of joint undivided property has no right to erect a building on land which forms a portion of such property, so as to materially alter the condition thereof, without the consent of his co-sharers—C. H. C. (Phear and Ainslie, J. J.)—7th June 1873—Sheopersand Singh—XII., B. L. R. p. 188.

The Same.

One of several co-sharers of joint undivided property has no right to take exclusive possession and alter the condition of any portion of the joint property without the consent of his co-sharers, and the Court will grant an injunction to restrain him from doing so.—C. H. C. (Phear and Ainslie J. J.) The 12th June 1873, Stalkartt, XII., B. L. R., p. 197.

Misconception of Evidence—Remand.

Where the Lower Appellate Court stated that not a single witness had alleged possession and it was found that two witnesses at least had done so, the misconception of evidence was considered as a sufficient reason for a remand—C. H. C. (Markby and Birch J. J.) Ram Bundhoo Chatterjee XXI. W. R. p. 134.

Auction-Sale—Recovery of Purchase-money—Regulation VII. of 1825,—Section 257 of Act VIII of 1859.

Held, that a purchaser at an auction-sale in execution of a decree under Regulation VII. of 1825, or Act VIII. of 1859, can recover back his purchase-money from the decreeholder only when the sale is set aside summarily for irregularity or the like, under clauses 3 and 4 Section 4 of the former law or Sections 257 and 258 of the Act VIII., but not when a third party succeeds in establishing his title to the property on the ground that the sale did not affect the property, and when there is no allegation of fraud or misrepresentation on the part of the decree-holder.—C. H. C. (Peacock C. J., and Loch, Bayley, Kemp and Macpherson J. J.)—The 2nd September 1869—Sowdaminee Chowdrani—XII. W. R. (F. B.) 8.

Registration—Act XX. of 1866.

Where an instrument creates a title or interest in land and is also a bond for money lent, it may under Act XX. of 1866 be received in evidence as document in a suit to recover the money lent, even if it be not registered.—C. H. C. (Peacock, C. J., and Loch, Bayley, Kemp, and Mac-

pherson J. J.)—The 2nd September 1869—Luchmeeput Singh Doogur—XII. W. R., (F. B.) 11.

Reversioner—Cause of Action—Limitation.

In a suit by a reversioner upon the death of a Hindoo widow who had succeeded as heiress of her husband to recover possession of property by right of inheritance as next heir of the husband, the reversioner's cause of action arises at the time of the death of the widow, when the right of entry first accrued to the reversioner: and this is so, even when the widow in her life time professed to adopt a son and put him in possession of the property, if the reversioner denies the validity of the adoption.—C. H. C. (Peacock, C. J., and Loch, Bayley, Kemp, and Macpherson J. J.) The 2nd September 1869—Sreenath Gangooly XII. W. R. (F. B.) 14.

Appeal to Privy Council—Security from decreeholder.

During the course of a suit for damages, plaintiff applied that security might be required from the defendants under Section 81 Act VIII. 1859, and on their failure to give it, their property was attached. Plaintiff's suit was decreed in the first Court, but dismissed on appeal by the

High Court. He then appealed to the Privy Council and prayed to the High Court either to continue the attachment, or to require security from the defendants, pending the result of the appeal. *Held*, that the Court was not competent to adopt either course,—C. H. C. (Peacock C. J. and Loch, Bayley, Kemp and Macpherson J. J.)—The 3rd September 1869—Dittia Hurruckman Singh, XII. W. R. (F. B.) 16 ;—III. B. L. R. (F. B.) 45.

Civil Suit—Order by Magistrate—Nuisance.

AN order passed by a Magistrate for the removal or suppression of nuisances under Chapter XX of the Code of Criminal Procedure cannot form the subject of a suit or be set aside by a Civil Court.—C. H. C. (Peacock C. J. and Loch, Bayley, Kemp and Macpherson J. J.) the 3rd September 1869—Oojulmoye Dassce XII W. R. (F. B.) 18.

Dispossession—Section 230 of Act VIII of 1859.

When a party has been dispossessed under a decree obtained in a suit instituted under Section 15 Act XIV of 1859, he need not bring a regular suit on proper stamp to regain possession, but may apply under Section 230 Act VIII, of 1859—

C. H. C. (Peacock C. J. and Loch, Kemp, Macpherson and Mitter J. J.)—The 7th September 1869—Brohmomoyee Debea—XII. W. R. (F. B.) 25.

Bond—Consideration—Onus Probandi.

Where in a suit on a bond which recites that consideration passed, the defendant admits the execution of the bond, but avers that he received no consideration or only part of the consideration, the onus lies on the defendant to show that the recitals in the bond are not correct.—C. H. C. (Peacock C. J. and Loch, Kemp, Macpherson and Mitter J. J.)—The 7th September 1869—Foolce Bibee—XII. W. R. (F. B.) 25.

Kabuleut—Pottah—Suit—Notice Sections 9 and 13 Act X. of 1859.

A Landlord cannot bring a suit to compel a ryot to execute a kabuleut unless he first tenders a pottah to the ryot such as he is entitled to receive under section 9 Act X. of 1859; and a suit for a kabuleut at an enhanced rate of rent cannot be supported without a previous notice under Section 13 Act X. of 1859—C. H. C. (Peacock C. J. and Loch, Kemp, Macpherson and Mitter, J. J.) The 7th September 1869—Ukhoy Sunker Chuckerbutty XII. W. R. (F. B.) 27.

MOFUSSIL SMALL CAUSE COURT LAW.

Act XI. of 1865, Section 6.—

The following suits are cognizable by Courts of Small Causes: namely, claims for money due on bond or other contract, or for rent, or for personal property, or for the value of such property, or for damages, when the debt, damage, or demand does not exceed in amount or value the sum of five hundred rupees, whether on balance of account or otherwise.

Provided that no action shall lie in any such Court :

(1.)—On a balance of partnership account, unless the balance shall have been struck by the parties or their agents.

(2.)—For a share or part of a share under an intestacy, or for a legacy or part of a legacy under a will.

(3.)—For the recovery of damages on account of an alleged personal injury, unless actual pecuniary damage shall have resulted from the injury.

(4.)—For any claim for the rent of land or other claim for which a suit may now be brought before a Revenue Officer, unless, as regards arrears of rent, for which such suit may be brought, the Judge of the Court of Small

Causes shall have been expressly invested by the Local Government with jurisdiction over claims to such arrears.

Incidental Questions of Title.

The Small Cause Court has jurisdiction to enquire into title so far as might be necessary to give it the means of properly adjudicating a claim for damages, although its judgment would, of course, be conclusive only as to the damages claimed in the suit. 7. W. R. 73, *Hedaetollah*; vide also 4 Agra, 290, *Shama Nund*; 8, Bom. A. C. 23, *Khander*; 4 Bom. A. C., 173, *Rutnasankar*.

In a case plaintiff sued defendant in the Small Cause Court for damages for having cut down and removed trees from plaintiff's land. Defendant pleaded that he was entitled under his pottah. Held by a Full Bench of the High Court of Calcutta that the Court had jurisdiction to try the question of the genuineness of the pottah. In delivering the judgment of the Full Bench, Peacock, C. J., observed " Although the question of title under the mourasi pottah arose incidentally, the Judge had power to try the question as to the amount of damages. His judgment will not be conclusive, except so far as regards the right to the damages claimed in the

suit. By the English County Court Act express provision is made that County Courts shall not try a case in which the title to the free-hold comes into question, unless by agreement of the parties. But there is no such provision in the Indian Act. We think, therefore, that the Small Cause Courts have jurisdiction to try questions of title which incidentally arise in suits cognizable by them"—*Raghuram Biswas*. B. L. R. Full Bench Rulings, Part I, p. 34.

The jurisdiction of the Small Cause Court is not barred because it has to enquire into a question of title to land as incident to the question of the value of trees taken off the land.—2 W. R., 179—*Shumbhoo Chowdhry*.

It may be remarked that the parties may afterwards have the question of title tried in any Civil Court having jurisdiction.

Where the cause of suit as stated by the plaintiff appeared to be within the cognizance of a Court of Small Causes, the mere denial by the defendant of the plaintiff's right of title is not sufficient to oust the jurisdiction of the Court. If it reasonably appears to the Judge that a *bona fide* question of right which is not within his jurisdiction to decide is fairly raised in the suit,

his jurisdiction ceases.—2 Mad. Rep, 184, *Ammallu*.

Suits for Maintenance.

When a suit for maintenance is not a claim for money due upon contract, it does not fall within the definition of any of the claims made cognizable by Act XI of 1865, Section 6, and is therefore not cognizable by the Small Cause Court.

Case.—The plaintiff having obtained a decree in the Moonsiff's Court against the defendants establishing her right to maintenance, which was a charge on property inherited by, and in the possession of, the defendants, brought a suit in the Small Cause Court for arrears of maintenance. The Small Cause Court referred, for the opinion of the Calcutta High Court, the question "whether a suit of this kind is maintainable in a Small Cause Court," and in its order of reference stated—"In the present case, the plaintiff admits that the maintenance in question is a charge on property inherited. The circumstance of the plaintiff having established her right to the maintenance does not make any great difference. I conceive it is still open to the defendants to contest their liability for the whole or any portion of the plaintiff's claim,

on the ground of the whole or any portion of the estate inherited by them having suffered diminution from causes independent of them ; and the question between the parties, * * * * may involve long and intricate investigations unsuited to the speedy course of procedure prescribed for the Small Cause Courts." The Calcutta High Court decided "that a suit for maintenance is not cognizable by a Small Cause Court * * * If a case of this sort is not cognizable, it makes no difference that a particular case does not involve intricate questions of law or fact."*

Vide a similar decision in IX. W. R., 214, Kaminee Dossee.

In VI W. R., 286, Bhugwan Chunder Bose, the Calcutta High Court said "We hold that the Small Cause Court could have jurisdiction only as regards arrears of fixed maintenance, and not for determination of the right to receive it."

In Bombay it has been held that an original suit by a Hindu widow for maintenance is cognizable by the Small Cause Court.†

In Madras, Rule 4 of the directions and Rules of Practice for Courts of Small Causes, passed by the Madras High Court

on the 8th January 1863, states "Courts of Small Causes have no jurisdiction in suits to establish a right to maintenance ; but if this right has been judicially decided, and the only question is whether arrears claimed are due or not, they may adjudicate on such a claim."

It seems that a suit for arrears of maintenance settled by a will, is one for a part of a legacy, and as such not cognizable in the Small Cause Court.*

Suits to recover money paid out of Court in satisfaction of decree.

Where a decree-holder expressly contracts with his debtor to certify to the Court payments made outside in satisfaction of a decree, a suit for damages will lie against him in a Small Cause Court for breach of contract.‡

Case.—In a suit to recover money paid from time to time to defendant, a decree-holder, who entered the payments in a *hath-chittah* which he made over to plaintiff, promising to enter them on the back of the decree ; but subsequently, ignoring the payments, executed the decree in

* Nobin Kalee Debea, V. W. R., S. C. Ref. 5.

† Dikshit, 4 Bom. H. C. Rep. (A. C.) 73 ;
Judal Kour, 4 Bom. H. C. Rep. (A. C.) 75.

* Tara Soonduree Debea, Suth. S. C. Ref. 66.

‡ 5, Wym. S. C. 20 ; *Bhuggoban Tanti* ;
9, W. R., 210.

full : *Held* by the Calcutta High Court that a suit will lie in the Small Cause Court for damages sustained in consequence of decree-holder fraudulently omitting to certify to the Court the payments made by plaintiff.*

In a case, A, a judgment debtor, paid to B, the decree-holder, a sum of money by way of compromise, in full satisfaction of the decree. B failed to certify this payment to the Court, and afterwards executed her decree for the full amount. In a suit by A against B for recovery of the amount previously paid out of Court in satisfaction of the decree, a Full Bench of the Calcutta High Court *held* that, notwithstanding Section 11 of Act XXIII. of 1861, the suit was maintainable. Couch C. J., in delivering judgment said "I would observe, with regard to the case in the High Court of Madras,† that Mr. Justice Holloway, for whose judgment I have the greatest respect, seems to treat the case as if it was a suit not to recover the money originally paid under the compromise, but to recover back the money which

was levied in the execution of the decree. I think that is not the nature of the suit before us; this suit is to recover back the money first paid, of which the defendant must be regarded as a trustee for the plaintiff, and as such liable to refund it."*

Suits upon Bond.

A Small Cause Court can try a suit for an amount within its jurisdiction, notwithstanding that it is upon a bond the amount of which is beyond its jurisdiction, 6. W. R. 6, Sukee Money Dabia.

A Small Cause Court has jurisdiction to give a simple money decree in a suit upon a bond in which landed property is hypothecated.—12, W. R. 367,—Doorhyar Roy.

Where a suit was brought for interest amounting to less than Rs. 500, due upon a bond for Rs. 1,000, not yet payable, *held* that a Court of Small Causes has jurisdiction to try the case, the plaintiff having had a separate and complete cause of action upon the bond entitling him to recover the annual interest as it accrued due. The fact that forgery of the bond is set up as a defence makes no difference. 2 Mad. Rep., 469—Anantha Nairainiapparyan.

* 9, W. R., 210, Bhugwan Tanti.

† 3. Mad. Rep. 188, Arunachella Pillai, in this case a Full Bench of the Madras High Court held that such a suit was not maintainable.

* 5, B. L. R., p. 223, Gunamani Dasi.

A suit on an instalment bond given for arrears of rent is cognizable as it constitutes a mere debt, even although the arrears themselves could only have been sued for in a Revenue Court.—*Rajah Suttochurn Ghosal*, 2 W. R., Sec. 5.

Where an ijara constituted a mortgage of the rents as a security for an amount due on a bond, with a stipulation that the balance, after paying the jumma payable by the mortgager, should be applied by the mortgagee in payment of the bond, *held*, that the Small Cause Court has jurisdiction to try what amount is due on the bond, and also to try the question of payment by means of the rents assigned.—*Mohima Churn Mookerjee*, 6, W. R. 16.

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Suits on (bond or other) Contract.

Where the defendant entered into an agreement in writing with the plaintiff (the widow of defendants brother) to deliver to her every year a specified quantity of paddy by way of maintenance. *Held*, the Small Cause Court had jurisdiction to entertain a suit for the breach of the agreement.—*Y. Panpamma*, 5 Mad. 432.

A servant borrowed on account of his master a sum of

money, which was partly spent in satisfaction of his master's debt and partly taken by the latter and spent for his own private purposes. No repayment having been made by the master, the lenders obtained a decree against the servant, who thereafter sued the master to recover the money: *Held*, that the legal presumption was that the money was advanced on account of the defendant on the understanding that it would be repaid; and that the action was one for debt, and consequently cognizable by a Small Cause Court.—*Rashmonee Debia*, 15 W. R. 86.

A suit by a gomashtha for excess expenses incurred by him over and above the amount of rents collected by him, is cognizable in the Small Cause Court, notwithstanding that the nature of the defence may render it necessary to investigate the accounts of the mehal, assuming a contract to have existed between the plaintiff and the defendants that the plaintiff should act as a gomashtha and collect the defendant's rents, and do all acts necessary for the discharge of his duty as gomashtha, and that he should be repaid such expenses as he should be at in the course of that employment.—*Prosunno Chauder Roy*, 7. W. R. 422.

In a suit for money for which plaintiff agreed to let defendant tap certain date-trees and appropriate the produce for a single season, it was *held* that it was not one for rent, but for the breach of a contract in respect of which a Small Cause Court has jurisdiction.—*Deb Nath Ghose*, 6 W. R. Civ. Ref. 8.

The plaintiff's late father, a Nazir in the Judge's Court of Tipperah, was made to pay the sum of Rs. 1,879 that had been stolen from the Government Treasury, of which sum Rs. 245, was subsequently found by the police and handed over to the plaintiff and the other heirs of her father. She then sued to recover Rs. 408 her share of the balance paid by her late father to Government. *Held*, that her right to recover being based either on the fact, that Government procured this payment by wrongful means, or that it had got the money in its hands under such circumstances that it was bound to repay it, in other words on an implied contract to repay it, her suit lay in the Small Cause Court.—*The Collector of Tipperah*—4 B. L. R. App. 46.

Plaintiffs having obtained a sum from defendants on a bond, let certain land to them in ijarah for a term of years on condition

that the latter after realizing rents from the ryots would give credit on account of interest on the said bond, pay rent due to plaintiffs' landlord, and pay the balance to plaintiffs. Having failed in the engagements defendants were sued in the small Cause Court. *Held*, that the suit was a suit on contract and could not have been brought any where else—*Nobin Chunder Vodro*, 16, W. R. 228.

A suit to recover money paid as price of land in consequence of vendor's failure to complete the bargain by registration of the deed of sale, is maintainable in a Court of Small Causes, being substantially a suit for breach of contract for sale of land.—*Charoo Khan*, 9 W. R., 498.

*Suits for Rent.**

A suit for rent of land used for building purposes is cognizable in a Mofussil Court of Small Causes.—19, W. R., p. 208, *Pearee Bewah*, 1. Legal Companion, p. 111.

A Small Cause Court has jurisdiction to entertain and determine a suit for the rent of land situated in a village in the interior of a district, and used parti-

* Vide Proviso 4, Sec. 6, Act XI of 1865; Section 104, Act VIII of 1860, Bengal Council.

ally for building purposes.—XXI W. R. 5, Gokul Chunder Chatterjee.

A claim to *purjote* or rent of land occupied by a house or subsidiary to its enjoyment, though such land be entered in the village *jummabundee* or rent-roll is cognizable by a Small Cause Court. *Baboo Moti Chund*, 7 Madras Jurist, 70.

In a suit for rent or hire of land which defendant used and caused to be used for passing and re-passing to and from his Steamer. *Held* that, if there was no express hiring, the defendant ought to be sued for damages for trespassing upon on the plaintiff's land; that, if he agreed to pay for the use of a way across the land, it would not be rent, and that in either case the Small Cause Court was competent to entertain the suit, 5. W. R. S. C. Reg. 18, Brice.

A landlord cannot recover rent of lodgings knowingly let to a prostitute who carries on her vocation there; the principles of English law applying to this country—XVIII. W. R. p. 445. *Gouree Nath Mookerjee*.

Suits for personal Property.

Where moveable property has been pledged in a mortgage bond as security for a loan, and the amount due on the mortgage is

tendered but declined, the mortgager's suit for possession will lie in the Small Cause Court, he, having a right of possession (to *personal property*) from the time of the tender—a period antecedent to the commencement of the suit. But if there has been no tender and the suit is for possession after ascertainment of defendant's lien on the property, the Small Cause Court has no jurisdiction in the matter.—*Bhotarinee Ohosany*, XVI. W. R., 58.

If a co-sharer of personal property, sells the property, without the consent and authority of the other owner that other owner, may sue the purchaser for the price of his share. Small Cause Court have jurisdiction to entertain such a suit—2 W. R., 37, *Radha Nath Shaha*.

A suit for the price of bricks carried away, after declaration of title to half the property, held to be a suit to establish a title to real property and obtain a declaration thereof, and to be cognizable by the Moonsiff's Court—4 W. R., 58. *Mathar Nath Gossamy*.

Plaintiffs sued for recovery of a sum of money lent upon the pledge of personal property, and prayed that the moveable property pledged may be declared liable. *Held* that a Small Cause Court

has jurisdiction to entertain suit to enforce a contract pledging moveable property—2 Mad. Rep 474, Appaun Pillai.

A suit to establish the plaintiff's right to the exclusive possession of personal property of which the plaintiff and her husband had been dispossessed by actual seizure in execution of a decree against the plaintiff's husband, is a suit for "personal property" and as such cognizable by a Small Cause Court.—Janakiammal, 5 Mad. 191. vide a similar decision—Radhakissen, 3 All. 155.

Suits for Contribution.

A suit for contribution does not lie in the Small Cause Court in the absence of an implied joint contract for contribution.

Case (1.)—Plaintiff, a co-sharer in an estate paying revenue to Government, deposited under section 9 (15?) Act XI. of 1859, the revenue due upon the whole estate to save the property being put up for sale. He then sued his co-sharers for contribution in the Small Cause Court, which referred for the opinion of the Calcutta High Court, the question "whether a joint sharer in an estate paying revenue to Government, who has paid the revenue due upon the whole estate, can

sue, in a Small Cause Court, his co-sharers for contribution." The question was decided by a Full Bench on account of former conflicting decisions, and it was answered in the negative. Peacock C. J., in delivering the judgment of the Full Bench, said, "we think that, according to the law administered in the Mofussil, the obligation to contribute is not founded upon contract in the absence of an express contract; and that no contract can be implied on the part of co-sharers of an estate to contribute towards the payment of the Government revenue. * * The truth is, there is no implied contract, either joint or several, for contribution. The payment of revenue by one share-holder is made, not at the instance or at the request of the others or with their consent, but to save the estate from being brought to sale for the arrears. In some instances it may be made contrary to express directions. In such cases there is an obligation to contribute, but surely not arising from an implied contract. The duty of contributing is caused not by any convention or agreement between the share-holders, but arises from the principles of justice which require that one shall not bear the whole burden in case of the rest, and that all the

OBJECT OF SUITORS.

Paley observed, that suitors would press any suits, whatever their merits, in which they perceived the slightest chance of success. This shows that *success*, and not *Justice*, is their object. Long ago Adam Smith observed that though men have a keen and quick sense of what is just in other men's cases, they are too often blind or unreasonable to it in their own. And Lord Macaulay only followed out the same truth when he showed that men pursue not their true interest, but their own idea of it, which is very different indeed. Hence suitors pursue not justice but their own idea of it; and the sense of self-interest, even in the best, blinds them to what is just. The only difference in this respect between honest suitors and dishonest, is that the former *believe* they are in the right, and the latter do not care whether they are so or not. All alike desire not justice, but success, and hence, as Paley says, will pursue any course open to them which affords the best chance of success.—*Law Magazine and Review*, London, December 1872.

CHAMPERTY AND MAINTENANCE—ILLEGALITY.

Equity will not uphold assignments which involve champerty, or maintenance, or buying of pretended title. Champerty (*campi partitio*) is properly a bargain between a plaintiff or defendant in a cause, and another person who has no interest in the subject in dispute, to divide the land (*campum partire*) or other property sued for between them, if they prevail at law, in consideration of the other person carrying on the suit at his own expense. Maintenance, of which champerty is a species, is properly an officious intermeddling in a suit which in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. And an agreement whereby a person engages to supply information and evidence for the recovery of property, on condition of receiving a part of it, is maintenance of the worst kind, as it leads to perjury and perversion of justice. Champerty and maintenance are punishable, both at the common law and by statute, as tending to keep alive strife and contention, and to pervert the remedial process of the law into an engine of oppression. Exceptions are made

however to the general rule against champerty and maintenance, in the case of father and son, or of an heir apparent, or of the husband of an heiress, or of a master and servant, and the like. And a deed whereby, in consideration of a son prosecuting a commission of lunacy in the father's name against a person to whom the father is heir-at-law the father covenants to convey the estates that should descend to him on the lunatic's decease, to the use of himself for life, with remainder to the use of the son and his children, is not illegal, as savouring of champerty or maintenance, or as against public policy.

Upon the same principle of not giving any encouragement to litigation, especially when undertaken as a speculation, equity will not enforce the assignment of a mere naked right to litigate, that is, a right which from its very nature is incapable of conferring any benefit except through the medium of a suit; such as a mere naked right to set aside a conveyance for fraud. But a person who is interested in a fund in Court, may mortgage it *pendente lite*, to enable him to prosecute his claim. And a person may take an assignment of the whole interest of another in

a contract, or security, or property which is in litigation, at least if he does not undertake to pay the costs which the seller had incurred, or make any advances beyond the mere support of the interest which he has so acquired.—Smith's Compendium of the Law of Real and Personal Property, Vol. II, p. 857-9.

EQUITABLE PRINCIPLES.

Laying out money under an erroneous opinion of title—

Encouragement by the real owner.

The Court will not permit a man knowingly, though passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is, in many cases, as strong as using terms of encouragement. When a man builds a house on land supposing it to be his own or believing he has a good title, and the real owner perceiving his mistake abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not allow the real owner to assert his legal right against the other, without at least making him full compensation for the monies he has expended.—C. H. C. (Norman and

E. Jackson JJ.) Mussumut Rane Rama, III B. L. R. (A. C.) 18.

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Suit for Ejectment—Long Occupation.

In a suit for ejectment of defendants, who were purchasers from the original tenants, *held* that looking to the fact of the long and uninterrupted occupation of the defendants, their vendors, and the ancestors of those vendors, and to the conduct of the plaintiff in permitting the defendants to erect a pukka dwelling-house in one of the plots, it would not be equitable to give the plaintiffs a decree, and that too without any compensation to the tenants—Baney Madhub Bancrjee, XI. W. R., p. 354.

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Ejectment—co-proprietors as tenants.

A suit having been brought to obtain possession of certain lands which were admittedly in defendant's possession, and which were cultivated by them and turned by them from waste land into cultivated land, the Lower Appellate Court found that the plaintiffs were never in possession of those lands, and were not entitled to oust the defendants and take khas possession of them as against the defendants. The

plaintiffs and the defendants were co-proprietors. *Held*, the plaintiffs might have some right to rent, but they were not entitled to oust their co-proprietors, who have, as tenants, brought this land into cultivation.—C. H. C. (Kemp and E. Jackson J. J.) The 18th February 1868—Pran-kishore Gossain—IX. W. R. 291.

Ejectment—Building erected bona fide on lands of another.

Buildings and other such improvements made on land in the mofussil do not, by the mere accident of their attachment to the soil, become the property of the owner of the soil. If he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials or to obtain compensation for the value of the building, at the option of the owner of the land.—C. H. C. (Peacock C. J. and Bayley, Norman, Pundit and Campbell JJ.) The 12th September 1866.—Thakoor Chunder Poramanick VI. W. R. 228.

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Suit for demolition of building.

The plaintiff sued for possession of one-third share of certain land after demolition of the

buildings erected thereon by the defendants who were her co-sharers. *Held* that the plaintiff was not entitled to a decree for demolition of the buildings, as she had no right to compel her co-sharers to adopt her views of the enjoyment of the property. She could only get a decree for possession of an undivided one-third share.—*Bindabashini Debi*, 3 B. L. R. A. C. 267.

Co-sharers—Improvement of Puteet Land by one—Right of another to Possession of Specific share—Partition.*

The Defendant, having spent large sums of money in improving what was originally puteet land by locating ryots and building houses upon it and turning it into a village called after his name,—*held* that plaintiff, his co-sharer, was not entitled to claim possession of a specific share in that village, but only to demand a partition in which plaintiff would obtain compensation by receiving elsewhere lands equivalent to that brought into cultivation by the defendant at his own expense. *Kemp, J.*, in delivering judgment said, "The principle laid down, in a decision passed on the 20th of May 1869, by the late Chief

Justice Sir Barnes Peacock and Mr. Justice Glover, appears to us to apply to the circumstances of this case. In that case the learned Judges observe that a man may insist upon his strict rights, but that a Court of equity is not always bound to give him such strict rights. In that case, a joint owner erected a wall over some of the joint lands. The first Court had held that the defendant erecting a wall upon the joint lands, without the consent of his co-sharers, was unlawful, and that the wall must be demolished. The learned Judges held, as already observed, that the plaintiff was not entitled to insist upon his strict rights, and that a Court of Equity would not give them to that extent. The Judges said that his remedy was to apply for a partition, and that it was not equitable, after the defendant had gone to the expense of erecting this wall, to have it demolished at the suit of his joint Co-sharers. Applying the principle of that decision to the present case, we find that it is admitted even by the plaintiff's witnesses that the defendant has spent large sums of money in improving this land and in turning the puteet land into a village, which is now called after his name.

* *Puteet i. e.*, unoccupied.

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THE ART OF ADVOCACY.

Necessity for Advocates.

‘When did a time exist when there were not to be found the weak, the timid, and the oppressed, who either dared not, or could not, plead their own cause without assistance, at the footstool of justice. Even when the appeal was not to justice but to power, how often, in the infancy of the world, must the suppliant have needed the agency of a friend to stand between him and vengeance, and solicit mercy and pardon; that friend thereby became his advocate. All whom inability or diffidence prevented from speaking for themselves, because they were “not eloquent, being slow of speech, and of a slow tongue” must, like Moses, have required an Aaron to stand forward as the spokesman on their behalf. It was this feeling which wrung from Job, in the depth of his anguish, the bitter cry, “O that one might plead for a man with God, as a man pleadeth for his neighbour.”’

Suitable Style of Address to be adopted by Advocates.

The first leading principle in the art of advocacy manifestly is to suit the style of address to the occasion. An impassioned and

declamatory harangue, which may be proper where success is to be gained by working on the feelings, is obviously out of place where the matter can be decided only by reason, in accordance with a prescribed rule of law. An address to a body of persons, who have there and then to decide upon the object of the speech is subject to vastly different requirements to those adapted to an address upon even the same matter made to a judge who has for years been familiar with the eloquence of the Courts, and who may postpone his decision till any impressions, which may have been made upon his feelings, sympathies by the talent of the speaker, have passed away, and left him to act on the unbiassed judgment of his own opinion. In the one case the advocate needs rhetoric, tact, and plausibility; in the other he requires clearness of statement, and soundness of plain argument. Ingenuity and readiness he must have in either case, but they must generally be differently applied, as they are addressed to a judge or a jury. With the latter it is advisable to dwell almost wholly on a few salient points and over-subtlety of distinction and comparison is nearly sure to fail to go home to the sympathies

of those to whom it is addressed. By thus enforcing some one strong point, or fastening on, and showing in its most unfavourable light, some weak point on the opposite side, the skill and eloquence of an able advocate have over and over again gained the verdict of a jury for his client, when, had the decision rested with the judge, the weight of the collective facts would have turned the scale the other way. In this country, where the vast majority of cases are heard and determined by a single judicial officer, the method of advocacy which is best suited to a jury, or popular assembly, is, in many of its most distinguishing features, that which ought to be avoided by the practitioner who would gain the confidence of the Court. Impassioned declamation and gesture, wit, and sarcasm, florid imagery, and words rushing like a river, are more likely, in such circumstances, to injure than to benefit the case in which the advocate may try to employ them. To any one who should seek any advice as to the style to which he should train himself to plead in the Courts of this country, I should answer somewhat as follows: Repress all tendency you may have to the higher flights of oratory. If you

have a talent for a flow of words, prune it down, and regard it rather as a defect than an advantage. If not carefully checked, it is apt to make you diffusive and inaccurate. Your aim should be to attain precision and clearness, with the utmost possible conciseness sufficient to make your meaning thoroughly understood. Before you rise to speak, have the order of your subject definitely and logically arranged in your mind. Having thus conceived the scheme of your argument, dispose of each branch of it in order, not wandering from point to point, but confining yourself strictly to one head of your argument at a time, and finally disposing of that before proceeding to the next. Do not dwell on minor points, or fritter away your speech in a number of unconnected remarks upon each detail of the case. There is in this country a large class of practitioners whose first object in dealing with a body of evidence is to worm their way through it with painful minuteness, to bring to the surface each and every discrepancy, however insignificant, between the statement of one witness and another. To a mind accustomed to work in this way, it in time becomes scarcely possible to take a broad general view of a case,

and present it, either for attack or defence, on its main issues. This is as feeble and unsatisfactory a way of handling a case as could well be, and the fact of its being so common can only be attributed to the circumstance that no sort of talent is needed to perform such a mere mechanical task. Where contradictions in testimony are of such a nature as to go to the root of the credibility of the witnesses, it is of course the duty of the advocate to expose them; but that is a very different thing from making the whole of an argument on the facts consist in almost every case of a microscopical examination of discrepancies in the testimony given to them. It was said of Lord Mansfield that his statement of the facts of a case was worth another man's argument, and the saying referred to that talent, which he exhibited in all possible perfection, of going lucidly through the facts in a connected narrative, bringing out point after point in logical sequence, and revealing the truth from the necessary dependence of one circumstance upon another, and of conduct upon motive. Two memorable illustrations of this art have recently been afforded in the speech of the late Attorney General, and present L. C. J. of the Common Pleas (Lord Coleridge,) and in the summing up of the L. C. J. of England, in the Tichborne trial. In either case, the mere process of unravelling the confused web of facts, and tracing the thread of the narrative continuously throughout its length, revealed the truth, and carried the conviction of it straight to the minds of all but (to use Sir A. Cockburn's words) "fools and fanatics" whose credulity and bigotry would not be shaken, though one had risen from the dead to testify to these things. There can be no better exercise for the cultivation of this style than to compose and write out speeches and arguments. This habit was assiduously practised by the great orators of antiquity, and much of the finish of their style is by themselves ascribed to their care in this respect.

Limits of the duties of Advocates.

"If the advocate refuses to defend, from what *he may think* of the charge, or of the defence, he assumes the character of judge; nay, he assumes it before the hour of judgment; and, in proportion to his rank and reputation, he puts the heavy influence of perhaps a mistaken opinion into the scale against the accused,

in whose favour the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel." This is unquestionably law, but the limit to it is this. A prisoner can, by our law, be convicted only on the evidence, legally admissible, adduced against him on his trial, and on the proof in this way of the charge as laid. It is the duty of his counsel to see that this only is done, to test the witnesses opposed to him, to see that they are deposing to facts within their own knowledge, and to urge every argument on behalf of his client, whereby these facts may fairly be displaced or put in a way consistent with his innocence. But for the counsel to assert a conscious falsehood, to direct suspicion against an innocent person, or in any way to lend himself to a dishonourable mode of discrediting an honest witness, or of foiling justice, is absolutely wrong. In civil cases, still more is it the counsel's duty, so far as in him lies, to be the servant of justice, and not the champion of wrong. If once he is conscious, beyond doubt, that he is on the side of fraud or oppression, I assert it earnestly, that he is bound to refuse to continue his aid to such a cause. Under any

circumstances, he cannot be justified in seeking to gain the victory for his client by any underhand or inequitable dealing. I have known a case in which a pleader in this country thus attempted to filch a judgment for his client by the artifice of calling his opponent into the witness-box, well knowing that a religious prejudice was likely to induce him to yield to the unjust claim that was being made upon him rather than thus violate a principle of his faith. When that ruse failed, the pleader tried another, by insisting on having the witness sworn on Ganges water and a toolsec leaf, hoping that his religious prejudices might then be too strong for his worldly interests. Happily this test was refused, and the entire falsity of the case attempted to be won by such discreditable cunning as this was exposed. But is there a man here who would approve such conduct as that, or maintain that it was any part of a counsel's duty to lend himself to such practices? I trust there is not one.

Where the advocate is not of his own knowledge aware on which side of a case the truth lies, he is of course bound to act on his instructions, and by all fair and legitimate means to en-

deavour to gain his client's cause. It may turn out that the merits of the case are with the other side, but until both sides have been heard, it cannot, in the great majority of cases, be said on which side the truth lies, and the advocate for either naturally has the side of the case on which he is retained represented to him in the most favorable light. The instances must necessarily be rare where a party goes into Court with a case plainly false on the face of it. If the circumstances are such as to raise a strong presumption of the injustice of the case for which the advocate is retained, he can, and I think ought, to question his client upon them, if an opportunity be given him to do so in consultation. If the attempted fraud is then avowed, no honourable man can consent to act in its support. I was myself once engaged for a plaintiff in a cause, where the case set up by him appeared to me to be so doubtful, that I asked for, and obtained, a consultation with the principal. In answer to my questions he at first stoutly maintained the truth of the facts which he had verified in his plaint and written statement, but under pressure admitted their falsity and the justice of my suspicions. I at

once refused to argue his case, and advised him to allow me to withdraw it on payment of the defendants' costs. With considerable reluctance he consented to allow me to do so, and afterwards thanked me for having saved him from the commission of the crime he had intended. I mention this to show what it is in the power of an advocate to do in the interests of right, and for one opportunity of this kind that counsel have, who are rarely brought into contact with their principals before the case comes on, pleaders and attorneys have many.

In the work of the profession there is much that is discouraging, hard, uninteresting toil, and keen rivalry and conflict. In this constant struggle, and contact with many of the worst features of human nature, there is much to blunt the finer feelings, and to make a man less careful of the dictates of fairness and candour, than he would be in matters of his own concern. Happily there are many whose conduct is a daily victory over these debasing tendencies. They are mindful that they owe a duty to their client, but a first duty to truth and to justice, in whose Court they stand between its ministers and its suppliants to direct its

decrees in the way of right. Inspired by this exalted view of their high calling, they strive to realise the ideal of their profession, which is honourable only so far as it is loyal to this law of its practice, which is independent only so far as it fearlessly assists in the attainment of right and the redress of wrong, and not as it is with prostituted tongue at the

service of any one who will pay it to do his work, and which is honoured in the names of a long roll of the world's greatest and best, who have won their fame and felt their highest pride in the calling of an advocate.—*Extracts from a lecture on "The Art of Advocacy," by Mr. Macrae, Barrister-at-Law, Calcutta.*

PRIVY COUNCIL.

Mortgage—Partition—Remedy of Mortgagees—Regulation XIX. of 1814.

Where the owner of an undivided share in a joint and undivided estate mortgages his undivided share, he cannot by so doing affect the interests of the other shares, and the persons who take the security, *i. e.*, the mortgagees, take it subject to the right of those shares to enforce a partition, and thereby convert what is an undivided share of the whole into a defined portion held in severalty.

Where such a partition is effected under the provisions of Regulation XIX. of 1814 before the mortgagees have completed their title by foreclosure, and the consequential decree for possession, the mortgagees of the undivided share of one co-sharer who has no priority of contract with the other co-sharers would have no recourse against the lands allotted to such co-sharers; but must pursue their remedy against the lands allotted to the mortgagor, and, as against him, would have a charge on the whole of such lands—Privy Council, 31st January 1874—Byjuath Lall—XXI. W. R. 233.

Toda Giras Haks—Immoveable Property
—Limitation Act XIV. of 1859, S. I.
Cls. 12 and 16.

In a suit to establish plaintiff's right to a toda giras hak upon defendant's inam village, and to recover arrears due in respect of that hak, the substantial question was whether the suit being for the recovery of an "interest in immoveable property" fell within the 12th Clause of the 1st Section of Act XIV. of 1859, or was to be governed by the 16th Clause. *Held* that the determination of the question depended upon the general construction to be given to the terms "immoveable property," and "interest in immoveable property" as used by the Indian Legislature: and that the term "immoveable property" comprehends all that would be real property according to English law, and possibly more. *Held* further that whatever may have been the origin of the hak, it must be assumed to be now a right to receive an annual payment which has a legal foundation and of which the enjoyment is hereditary, and that the liability to make the payment is not personal but attaches to the inamdar *virtute tenuræ*. *Held* accordingly that the interest of the hakdar was an "interest in immoveable property" within

the meaning of Act XIV. of 1859, and that the suit would be governed by the limitation of 12 years provided by the Clause 12th of Section 1.—*Privy Council*, 4th December 1873, Maharana Futtchsanji Jaswantasanji, XXI. W. R., p. 178.

HIGH COURT, N. W. P.

Decree—Execution—Co-debtors—Purchase of decree by one of several joint judgment-debtors—Remedy.

The only course open to one of several judgment-debtors, who purchases a decree against himself and his co-debtors, is to sue them in a regular suit for contribution, and to compel them to pay him their shares of the amount for which the decree was purchased. He cannot issue execution against his co-debtors, and recover from them the whole amount of the common debt.—(Pearson and Turnbull, J. J.)—4th September 1873, Khoshalee, 6 N. W. P. Rep. 1.—(Vide also 9, W. R. p. 230, Degumbarce Dabca); and 2 Legal Companion, F. B. Rulings, p. 5.)

Appeals lie only from decrees and orders, not from judgments.

An appeal lies from the *decree*, and not from the *decision* of a Court of Original Jurisdiction.

In a suit to recover possession of certain lands by setting aside a *Zur-i-peshgi* lease of them, the decree was for the dismissal of the suit; but in the judgment of the Court which tried the suit, there was a finding against the defendant as to certain items of the consideration for the lease, against which the defendant appealed. *Held*, that the Appellate Court should not have entertained the appeal.—Full Bench, 24th November 1874, Mussamut Pau Kooer, 6, N. W. P. Rep. 19.

Act I. of 1872, Section 110—Possession, —Allegation of qualified right—Evidence.

Where a person is alleged to be in possession, not as owner of the full proprietary right, but as a mortgagee, the burden of proof of such qualified ownership lies on the party asserting it. Such a case falls within the scope of section 110, Act I of 1872.—(Pearson and Turner J. J.)—2nd December 1873, Sheoruttun Gir, 6 N. W. P., Rep. 36.

Act XXII. of 1872, Jurisdiction—Fresh Suit—Decree—Appellate Court.

No provision of Act XXII. of 1872 sets aside decrees passed by Appellate Courts before the date on which it came into operation, or restores decrees of the Court

of First Instance which had been annulled by the Appellate Court ; nor is there any provision which debars a plaintiff, whose suit has been dismissed on the ground of its institution in a Court incompetent to receive it, from re-instituting his suit in a competent Court.—(Pearson and Turner, J. J.)—1st December 1873, Choonee Lall, 6, N. W. P., Rep. 34.

CALCUTTA HIGH COURT.

Arbitration Award—Act VIII. of 1859,
S. 327.

A Court was held to have done right in refusing to permit the filing of an award which was not complete in itself, and which, as a whole, the parties had not agreed to.—(Jackson and Ainslie J. J.) 17th December 1873, Rajcoomar Roy Chowdry, XXI. W. R. p. 182.

Arbitration Award—Act VIII. of 1859,
S. S. 312 and 326.

As long as the order of a Moonsiff quashing an arbitration award subsists in full force, the award cannot be said to exist as a binding award between the parties—(Phear and Morris, J. J.) 11th February 1874—D. Fitz-Patrick—XXI. W. R., 261.

Private Arbitration Award—Act VIII. of
1859, S. S. 325 and 327.

When a private award between parties is filed in a Court, the prescribed course is for the Court to give judgment upon it and pass a decree ; not to order execution before such decree has been passed.—(Phear and Morris, J. J.) The 25th February 1874, Sahel Ram Jha, XXI. W. R. p. 295.

Amendment of Plaint—Defect of Parties
—S. 73 of Act VIII. of 1859.

In a suit in which plaintiff claimed several plots of land, but did not specify the boundaries in respect of one of them, it was held that the proper course was for the Court to call upon the plaintiff to amend his plaint. Where a suit was ready for hearing, the first Court was *held* to have done wrong in dismissing it on the technical ground that persons having interest in the subject-matter had not been made parties ; it being the duty of the Court to take action under Act VIII. of 1859, S. 73.—(Jackson and Ainslie, J. J.)—6th January 1874—Jonab Ali Mollah, XXI. W. R., p. 187.

Res Judicata—Act VIII. of 1859, S. 2.

The cause of action in a suit cannot be said to have been

heard and determined in a former judgment unless it was put in issue and directly determined. Any finding or observations merely bearing on such issue, or any opinion incidentally expressed, cannot be considered a finding upon the issue so as to make that judgment a determination of the cause of action within the meaning of Act VIII. of 1859, S. 2.—(Couch, C. J., and Jackson J.)—14th January 1874, Shib Nath Chatterjea, XXI. W. R. 189.

Documents—Secondary Evidence.

Where a document is named by a plaintiff as the best evidence in his favor, he ought not in its absence to be allowed to give any other evidence until that document is accounted for.—(Phear and Morris J. J.)—11th February 1874—Asman Siug—XXI. W. R. p. 262.

Decree—Payment into Court—Duty of Judge.

When money is paid into Court by a judgment-debtor in satisfaction of a decree against him and in conformity with the provisions of the Civil Procedure Code, the Court is bound to pay it out immediately on the application of the judgment-creditor and to inform the judgment-debtor, when asked to do so, what is the amount remaining

due from him under the decree.—(Phear and Morris, J. J.)—16th February 1874—Luchmun Persaud, XXI. W. R. p. 272.

Suit for Property wrongfully taken in execution of decree—Jurisdiction—Act XXIII. of 1861, S. 11.

Where a party who has obtained a decree for land takes possession by his own act, and not by the act of the officer of Court, of more land than the decree gives him, *held* that a suit will lie to recover back possession of any land taken in excess of the decree.—C. H. C. (Markby and Birch J. J.)—The 19th August 1873—Mudhun Mohun Singh—XII., B. L. R., p. 201.

Error in Thakbust Map—Cause of Action.

MARKBY, J. (with him Birch, J.)—We think looking to the plaint that the suit is not one which would lie in the Civil Court. The only complaint is that the Thakbust map which was made in the year 1860 is erroneous. It is no where alleged that any injury has occurred to the plaintiff in consequence of that error, and therefore we think that there is no cause of action disclosed by the plaint.—C. H. C., 8th January 1874—Ram Bundho Chatterjea—XXI. W. R. 134.

HIGH COURT, N. W. P.

THE 29TH NOVEMBER 1873.

*Before Mr. Justice Turner.*THE QUEEN *vs.* GIRDHAREE SINGH.*Indian Penal Code, Section 307*
—Attempt to commit murder.

The knowledge that an act is likely to cause death does not constitute culpable homicide amounting to murder. It must be found that the act was committed with the knowledge that it must in all probability cause death. Where no such knowledge or intention was found, the High Court annulling the conviction of the prisoner under Section 307, found the prisoner guilty of attempting voluntarily to cause grievous hurt under Sections 325 and 511, Indian Penal Code.

TURNER, J.—The Judge considers that although there may have been no intention to cause death, the appellant committed an act with the knowledge that his act was likely to occasion death. The knowledge that an act is likely to cause death does not constitute culpable homicide amounting to murder. Had the Judge found the act was committed with the knowledge that it must in all probability cause death, he would have been justified in his view of the evidence in holding that the appellant was guilty of an attempt to commit murder. Assuming then that in the view which the Judge himself records of the appellant's act, the conviction under Section 307,

Indian Penal Code, was im-
I have to consider whether the evidence warrants a more serious presumption against the appellant, namely, the presumption that his act was done with the intention of causing death, or with the intention of causing such bodily injury as would be sufficient in the ordinary course of nature, or likely to cause death, or with the knowledge that his act must in all probability cause death. I think there is force in the argument advanced on behalf of the prisoner that had his intent been murderous, he might have armed himself with a weapon more certain of lethal effect even than a club. A club may be used with such force as to become a lethal weapon; it is also a weapon which, used with less violence, may cause less injury than such as would result in death, and judging of the appellant's intention and knowledge of the character of his act from the results of the act, the inference may be drawn that he had no such intention or knowledge as would render him amenable to conviction for an attempt at murder.

Nevertheless, I hold the evidence sufficient to establish that the appellant has been guilty of a very serious offence. He

entered the Kotwali and at once sought out the city Inspector, and forthwith attacked him as the Inspector sat unarmed on his charpoy. The weapon with which he attacked him is described by the witnesses in the Magistrate's Court as heavy bamboo lathee or stick: it was produced in Court, and if the Judge had considered the description of it incorrect, it must be presumed he would have stated so in his judgment. Moreover, from the tenor or his judgment, it is evident the Judge regarded the weapon as such as could produce death, and the committing officer to whom also the weapon was produced, describes it as a heavy bamboo club. Looking at the appellant's act and the nature of the weapon with which it was perpetrated, I come to the conclusion that he intended and attempted at the least to inflict grievous hurt.

Then there is absolutely no evidence of any grave and sudden provocation. The appellant may or may not have received provocation on a former occasion, but the whole of the evidence goes to show that no such provocation was given at the time. Acquitting the appellant of the offence of which he has been convicted by the Sessions Judge, I hold him guilty of attempting

voluntarily to cause grievous hurt, an offence punishable under Sections 325 and 511, Indian Penal Code, and I reduce the sentence passed on him by the Sessions Judge to rigorous imprisonment for three years and six months.

HIGH COURT, N. W. P.

THE 20TH DECEMBER 1873.

Before Mr. Justice Pearson.

QUEEN, *vs.* JOGESHUR PERSAUD.

Penal Code, Secs. 463, & 466—
Forgery.*

Where a Register of a public office was falsified, *i. e.*, some leaves of the Register were taken and others substituted for them, with a view to prevent the discovery of frauds already committed and for the purpose of avoiding disgrace and punishment, and not for the purpose of hindering the Government from recovering the sums fraudulently drawn, the conviction of the accused for forgery was quashed.

PEARSON, J.—The prisoner has been convicted of the offence described in Section 466, Indian Penal Code, on the basis of the following facts. Shah Rooknood-deen, as Deputy Inspector of

* Penal Code, Sec. 463—Whoever makes any false document or part of a document with intent to cause damage or injury to the public, or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract or with intent to commit fraud or that fraud may be committed, commits forgery.

Schools in the District of Goruckpore, on the 1st November, 1872, drew from the Government Rs. 10 on account of pay due to Ashruf Ali, for service rendered by him in the capacity of Urdu teacher in the Bansgaon School, from 22nd June to 22nd August, and Rs. 5-9-0 on account of pay due to Kedarnath, for service rendered by him in the capacity of under-teacher in the Gola School from 1st to 19th August, 1872. It has been discovered that neither Ashruf Ali nor Kedarnath were really employed in the Bansgaon and Gola Schools during the periods abovementioned. The charges made by the Deputy Inspector for pay due to them were fraudulent, and he has accordingly been convicted of the offences described in Sections 409 and 420, Indian Penal Code. When he became apprehensive that the frauds committed by him would be discovered, he instigated the prisoner Jageshur Persuad, who was employed in the Deputy Inspector's office and had charge of the Roznamcha Bahi to falsify that Register with a view to prevent the discovery. Some leaves of the Register were taken and others substituted for them. In the leaves thus substituted are found some entries which were not in the original leaves, and

which were designed to make it appear that Ashruf Ali and Kedarnath were really employed in the Bansgaon and Gola Schools during the periods abovementioned.

Among other objections taken on the prisoner's behalf to his conviction, one which may conveniently be first considered is, that the facts which have been stated, even if it be assumed that they have been rightly found, and are established by the evidence, are insufficient to prove any such intention as under the terms of Section 463, Indian Penal Code, is an essential constituent of the offence of forgery. This objection was raised in the Session's Court, but was disallowed by the Judge, who held that "by making these alterations an attempt was made to prove that Government was not entitled to recover anything from the Deputy Inspector, and thereby to cause wrongful loss to Government." The learned counsel for the prosecution has here contended that they were intended "to support a claim." But on behalf of the prisoner it was urged in reply that the false claim or charge had been preferred and allowed, and the injury thereby accruing to the public had been already caused before the date of the alterations

made by the prisoner in the Register, and that those alterations could not possibly have had any effect in supporting the false claim or charge or in causing the injury resulting from the false claim. They certainly did not cause the Government to part with the money fraudulently obtained; and if they could have been used for the purpose of hindering the Government from recovering the sums fraudulently drawn, I should still hold that there was not any evidence to warrant the conclusion that they had been made for that purpose, and with that intent. The obvious and natural inference arising from the circumstances is, that they were made with the intention and for the purpose of avoiding disgrace and punishment by concealing the frauds which had been already committed, and I see no reason to believe that further injury to the public, direct or indirect, was designed or contemplated.

From this point of view the conviction appears to be unsustainable, and I need not consider it from any other point of view.

The sentence passed on the prisoner is annulled, and his release is ordered.

HIGH COURT, N. W. P.

THE 5TH FEBRUARY 1874.

*Before Mr. Justice Turner.*THE QUEEN *vs.* THAKUR DASS.*Penal Code, Secs. 499 and 500*
—*Defamation.*

To sustain a charge of defamation it is not necessary to prove that the complainant actually suffered directly or indirectly from the scandalous imputation made on him by the accused, it is sufficient to show that the accused intended or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant.

TURNER, J.—On the hearing of this application it was urged that the offence was committed out of the local jurisdiction of the Magistrate by whom it was tried. Section 70 of the Code of Criminal Procedure, declares that no sentence or order of any Criminal Court shall be liable to be set aside merely on the ground that the trial has been held in a wrong district, unless it is proved the accused person was actually prejudiced in his defence by such error. Assuming that the offence was committed out of the local jurisdiction, it has not been shown nor suggested that the accused was in any way prejudiced by the error, and as I am of opinion, as I shall presently show, that there is no other ground for disturbing the convic-

HIGH COURT, N. W. P.

Convictions under S. 471 of the Penal Code and S. 474 cannot stand together.

“The Judge has convicted the prisoner of using certain forged documents, and on a second count of having the same documents in his possession with intent to use them. He could not well have used them unless he had them in his possession. I am of opinion that both convictions can not stand together.”—(Turner, J.) The 6th December 1873, Nuzur Ali, 6, N. W. P. Rep. 39.

Code of Criminal Procedure—S. S. 294, 297, 518—Powers of Revision of the High Court.

An order passed by a Magistrate under Section 518 of the Code of Criminal Procedure is not of the nature of a judicial proceeding, and is, therefore, not open to revision by the High Court under Section 297.—(Spankie, J.)—The 17th November 1873, Mokut Singh, 6, N. W. P. Rep., 16.

MADRAS HIGH COURT.

Act X. of 1872, S. 72 Justice of the Peace.

According to section 72, Act X. of 1872, a Justice of the Peace

has no jurisdiction over a European British subject, unless he himself is a European British subject.—The 18th December 1873—9, Madras Jurist, 105.

S. 9, Act VI. of 1864—S. 310, Criminal Procedure Code.

In the Proceedings of the High Court, dated 13th November 1871, reported at VI, Madras High Court Reports, Appendix XXXVIII, it was held that a sentence of whipping could not be postponed beyond the term specified in section 9 of Act VI. of 1864, and that the order directing the postponement was illegal. That ruling is still applicable to Section 310 of the Criminal Procedure Code.—The 10th December 1873—9, Madras Jurist, 104.

Discretion—Appellate Court—Rehearing—Default.

Section 278 of the Code of Criminal Procedure requires the Appellate Court to give a reasonable time for the appearance of the appellant or his counsel or authorized agent, and if one of these appears, to hear him before rejecting the appeal. When an appeal has been rejected without hearing the appellant's pleader, and it is afterwards proved to the

satisfaction of the Appellate Court that an adequate excuse has been made for the pleader's non-appearance, it is open to the Appellate Court to re-hear the appeal on its merits. Such a power should, however, be sparingly used.—7th November 1873 —9, Madras Jurist, 58.

Section 296 of the Code of Criminal Procedure—Power of Session Court.

In a case a complaint was preferred before an Assistant Magistrate against two persons, of an offence punishable under Section 409 of the Penal Code. The Assistant Magistrate held an enquiry and discharged the accused under Section 215 of the Code of Criminal Procedure. Subsequently, the Session Court, on a pertusal of the proceedings, directed their committal under Section 296 of the Code of Criminal Procedure. The Madras High Court held that Section 296 read with the definition of "Session Case" in Section 4 narrows the power to direct a committal to cases which have been investigated as a preliminary to committal. The order to commit was clearly bad in law.—5th November 1873, 9, Madras Jurist, 57.

CALCUTTA HIGH COURT.

Penal Code, S. 211.—Jurisdiction—Magistrate.

A Magistrate has no jurisdiction to convict in a case in which the accused is charged, under S. 211 of the Penal Code, with having falsely instituted a criminal charge of the offence of dacoity, as under Schedule 4 of the Code of Criminal Procedure, under the heading Section 211, the latter portion of it, it is clear that the offence charged is triable by the Sessions Court alone.—(Kemp and Glover J. J.) The 26th January 1874, Kader Buksh, XXI, W. R., Ce. 34.

Section 70, Act X. of 1872.—Jurisdiction.

Under S. 70 of the Code of Criminal Procedure, no sentence or order of a Criminal Court is liable to be set aside merely on the ground that the investigation, inquiry, or trial was held in a wrong district or sessions division, unless it is proved, or appears, that the accused person was actually prejudiced in his defence.—(Kemp and Ainslie, J. J.) The 7th March 1874, Girish Chunder Roy, XXI. W. R. Ce. 46.

*Execution of Decree—Kistbundi
—Extention of the period of
Limitation, even if agreed to,
invalid.*

A, obtained a decree against B, on the 17th September 1853. The decree was kept in force by sundry proceedings, the last of which was taken on the 30th December 1864. On the 6th February 1865, the parties filed a Kistbundi, whereby they agreed that the amount due under the decree should be payable by instalments, the first instalment to fall due on 14th July 1865; at the same time an existing attachment was given up. On the 14th July 1868, A applied for execution of the decree in respect of six instalments due under the Kistbundi. *Held* (Mitter, J, dissenting), the Court cannot recognize any arrangement between the parties enlarging the period of limitation allowed by law for the execution of decrees, or which alters the terms of the decree. The filing of the Kistbundi and relinquishment of the attachment was not a proceeding to enforce the decree or keep it in force. Execution of the decree was barred by limitation. Peacock, C. J., in delivering judgment, said "It appears to me that a Court of execution has no power to alter a decree of the Court which passed it, and

that parties cannot alter the law or a decree of Court by consent. A man may bind himself not to execute a decree of Court, or he may bind himself not to execute a decree of Court within a certain period, but he cannot, by binding himself not to execute the decree for a certain period, add to the time which the law allows him to execute it. If a man having a cause of action against another to recover immovable property, or to recover money, or to recover damages for a trespass upon his land, or for an assault, should say to that person "I will not sue you for twenty years," he would not acquire a right to sue after the period of limitation fixed by law. If he binds himself not to sue within a stated period, and does not intend to give up his right to sue at all, he must take care not to bind himself beyond the time within which the Law of Limitation allows him to sue. So, in the case of a decree, if a man binds himself not to execute a decree, within a certain period, he must take care, if he wish to execute the decree at all, not to bind himself, not to execute the decree for a longer period than that within which the law would allow him to execute it."—C. H. C., (Peacock, C. J., and

Bayley, Kemp, Glover and Mitter, J. J.,) The 4th September 1869, Krisna Kamal Sing, IV. B. L. R., (F. B.) 101.

Instalment—Kistbundi—Limitation.

Where a creditor has obtained a decree for money payable by instalments, the whole amount to become due on failure by the debtor to pay one of the instalments, he is, upon failure, entitled, notwithstanding S. 206, Act VIII of 1859, to come into Court and certify to the Court and prove payment of the earlier instalments, to show that execution of his decree is not barred.—C. H. C., (Peacock, C.J., and Loch, Bayley, Kemp, and Macpherson, J.J.)—The 13th September 1869. Fakir Chaud Bose, IV B. L. R., (F. B.) 130.

Mahomedan Law—Pre-emption between Mahomedan Vendor and Co-sharer and Hindu purchaser.

A Hindu purchaser is not bound by the Mahomedan law of pre-emption in favor of a Mahomedan co-partner, although he purchased from one of several Mahomedan co-parceners, nor is he bound by the Mahomedan law of pre-emption on the ground of

vicinage. A right of pre-emption in a Mahomedan does not depend on any defect of title on the part of his Mahomedan co-partner to sell except subject to his right of pre-emption, but upon a rule of Mahomedan law, which is not binding on the Court, nor on any purchaser other than a Mahomedan.—C. H. C. (Peacock, C. J., and Kemp and Mitter J.J., concurring, Norman and Macpherson J. J., dissenting)—The 13th September 1869, Sheik Kodratullah, IV., B. L. R. (F. B.) 134.

Regulation VIII of 1819, S. 13, cl. 4—Act VIII of 1865, B. C. S. 6—Act X of 1859.

An undertenant, who has saved the superior tenure from sale by depositing the amount of rent due, not only has the security of the tenure which he preserves, and of which he can obtain possession on application to the Collector, but he also has a right to recover the amount deposited by him as a loan in an ordinary suit:—C. H. C., (Peacock, C. J., and Kemp, Macpherson, Mitter and Hobhouse J. J.) The 10th September 1869, Ambica Dobi, IV B. L. R., (F. B.) 77.

Suit for Possession—Mesne Profits—Limitation.

The plaintiff brought a suit for possession of land with mesne profits. The suit was dismissed. He appealed on the question of possession only, and obtained a decree for possession without any mention of mesne profits; and afterwards, in execution of the decree, he obtained possession of the land. *Held*, the plaintiff could afterwards bring his suit to recover mesne profits from the date of decree for the period of six years next before the commencement of the suit, exclusive of the period during which the plaintiff was in possession. Sections 2, 7, and 196 of Act VIII. of 1859 and section 11 of Act XXIII. of 1861 were no bar to such suit.—C. H. C. (Peacock, C. J., and Kemp, Macpherson, Mitter and Hobhouse, J. J.)—The 10th September 1869—*Protab Chunder Barua*, IV., B. L. R. (F. B.) 113.

Evidence—Fact of Possession.

When a witness says that a party is in possession, that in point of law, is admissible evidence of the fact that such party was in possession, although the witness has not been cross-examined and asked how he knew it.—C. H. C., (Peacock, C. J., and

Bayley, Kemp, Glover and Mitter J. J.)—The 13th September 1869 *Manisam Deb*, IV B. L. R., (F. B.) 97.

Auction-purchaser—Suit—Estoppel—Section 27 Act X. of 1859.

A purchaser at an auction-sale sued to have his name registered in the Zemindary Serishta in respect of certain lands purchased at an auction-sale for arrears of rent, but not until after his application to the Collector under Section 27, Act X. of 1859, had been rejected. Both the Lower Courts decided that the suit was barred by Section 2 Act VIII. of 1859. *Held* that the proceeding under Section 27 Act X. of 1859, held by the Collector, did not bar the subsequent suit in the Civil Court.—C. H. C. (Peacock C. J., and Loch, Kemp, Macpherson and Mitter, J. J.)—The 7th September 1869, *Chunder Narain Ghose*—XII. W. R., (F. B.) p. 30.

Joint Hindu Family—Mitakshara law—Survivorship—Mortgage by a Member of his share of Joint Family Property.

A member of a Hindu family, living under the Mitakshara law, and having joint family property, died entitled to an undivided share in such property, leaving

two widows, him surviving. The widows were sued in their representative capacity in respect of debts incurred by him during his lifetime on his own account, and decrees were obtained against them. In execution, an interest in certain portions of the joint family property, to the extent of the share to which the deceased was entitled in his lifetime, was sold, and the auction-purchasers obtained possession of it. *Held*, that the share of the deceased did not at his death pass to his widows, but that (there being no male issue) it passed to the remaining members of the family by survivorship, and could not be rendered liable to the debts of the deceased in a suit against his widows.

Quære, whether those who take the share by survivorship, are liable for the debts of the deceased to the extent of his share.

A member of a Joint Hindu family has no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property, in order to raise money on his own account, and not for the benefit of the family—C. H. C. (Peacock, C. J. and Kemp, L. S. Jackson, Macpherson, and Glover J. J.) 30th July 1869—Sadabart

Prosaud Sahu—III. B. L. R. (F. B.) 31.

Mortgage—Agreement not to alienate.[†]

By an agreement reciting that A, had executed a bond in favor of B, for a certain sum of money, A, “in order to repay the bond-money in the terms in the bond contained,” declared that, “until the repayment of the money covered by the bond, he should not, from the date of the agreement, convey the property, mentioned therein to any one, by deed of sale, or deed of conditional sale, or mokurruree potta, or deed of mortgage, or zurcepeshege ticca potta. Should he make all these transactions in respect of the said lands, the instrument relating thereto shall be deemed invalid and as executed in favor of nominal parties for evading payment of the money covered by the said lands.”

Held, (Markby, J., *doubting*), that the instrument operated as a mortgage to A, of the lands comprised therein.

No precise form is required to create a mortgage.

C. H. C. (Couch, C. J., Kemp, L. S. Jackson, E. Jackson, and Markby.)—The 14th June 1870. —Rajkumar Ram Gopal Narain Sing.—V., B. L. R., p. 264.

co-sharers shall bear the burden in proportion to their respective shares. These shares and the amounts to be contributed may be ascertained in one suit in the ordinary Civil Courts, but not in the Small Cause Courts. * * * *

The obligation arises from what in the Civil Law was described as a *quasi* contract. Pothier in his Treatise on obligations, Part I, Chapter 1, Section 2, says:—

“In contracts it is the consent of the contracting parties which produces the obligation; in *quasi* contracts, there is not any consent. The law alone, or natural equity, produces the obligation. They are called *quasi* contracts, because without being contracts, and being in their nature still farther from injuries, they produce obligations in the same manner as actual contracts, * * *

* * * It has been usual with English critics to identify the *quasi* contracts with *implied* contracts; but this is an error, for implied contracts are true contracts, which *quasi* contracts are not. In implied contracts acts and circumstances are the symbols of the same ingredients which are symbolised in express contracts by words; and whether a man employs one set of symbols or the other must be a matter of indifference, so far as concerns

the theory of agreement. But a *quasi* contract is not a contract at all. The commonest sample of the class is the relation subsisting between two persons, one of whom has paid money to the other through mistake. The law, consulting the interests of morality, imposes an obligation on the receiver to refund, but the very nature of the transaction indicates that it is not a contract, in as much as the convention, the most essential ingredients of contract, is wanting. * * *

Care should be taken not to confound cases like the present with cases in which there is a convention. If a man buys goods, and they are delivered to him, there is a contract of sale, and an implied promise to pay the price, though there may be no contract in words to do so. So, if a man hire at certain wages another who serves him under the hiring, there is an implied contract to pay the wages. If one man borrows money from another, there is a contract of loan, and an implied promise to repay the money lent. If one man pays money for the use of another at his request, there is, in the absence of circumstances showing that the money was advanced as a gift, an implied promise for repayment by the person on

whose account the money is paid. We have thought it right in order to prevent misconception to point out the distinction between cases in which there is and those in which there is not a convention.*

Case (2).—A suit was brought against 23 defendants, of whom the present plaintiff was one, for having wrongfully constructed a bandel and caught fish within the limits of a julkar belonging to the plaintiff in that suit. A decree was given against them all jointly for the sum of Rs. 204-8, and the plaintiff's property having been attached in execution of that decree, he paid the whole amount. He then sued all the other defendants for contribution in the Small Cause Court deducting his own share, namely Rs. 8-14-6, being a $\frac{1}{23}$ rd share. On a reference to the Calcutta High Court, the case was decided by a Full Bench in consequence of conflicting decisions as to whether a suit for contribution can be maintained in a Small Cause Court. Peacock, C. J. in delivering judgment said, "for the reasons given this day in our judgment in the case of *Ram Bux Chittanjeet vs. Modhusoodun Pal*

Chowdhry and others, we are of opinion that there was no implied contract for contribution, and most certainly that there was no joint contract on the part of the 22 defendants. Consequently, the Small Cause Court had no jurisdiction, and the Judge was right in dismissing the case."*

But a contrary decision has been recorded in a Full Bench case at Madras.† Scotland C. J. said, "This case raises substantially the question whether one of several debtors against whom a decree for rent had been obtained can sue his co-debtors for contribution in a Court of Small Causes. The claim is founded upon the defendant's obligation as a co-contractor to pay a proportionate part of the joint debt which the plaintiff had been compelled to discharge, and whether that is an obligation 'on contract' within Section 6 of the Act Governing Courts of Small Causes in the Mofussil (No. XI of 1865) is the point to be considered.

"There can be no doubt, I apprehend, that the language of the section 'claims for money due on contract,' was intended to have the meaning which ac-

* VII. W. R. 377, *Rambux Chittangec.*

† The Preceding Case No. 1.

* VII. W. R. p. 384, *Sree puty Roy.*

† 5 Mad. Jur. 404, 5 Mad. 200, *Govinda, Muneya Tereyan.*

cording to English law it would properly bear, and is consequently not restricted to obligations created by express assent to the terms of an agreement, but include the class of obligations which by the law rest on contracts implied from the circumstances in which the parties stood at the time the obligation arose. The jurisdiction in the present case then depends upon whether the obligation of the defendants is one of this nature. Now I consider that the English decisions have unquestionably established that when a person does or undertakes to do anything which is a benefit to another or burthensome to himself on the request of that other, or which the latter was under a legal duty to do arising out of a relation formed by contract, the law presumes that the parties promised to perform what was just and reasonable with respect to the thing done, and so creates an implied contract which is treated as the basis of the obligation to perform what is just and reasonable.

Further, I do not feel that any serious objection is presented by the difference between the liability to contribution imposed by the Common Law Courts and by the Courts of Equity in England.

Equity and good conscience is the rule to be administered by the Courts in the *Mofussil*, and whatever under it is the limit of the obligation which joint-debtors incur, it seems to me that an implied contract may be raised to the same extent on the general ground just expressed.

“The liability to contribution on an implied contract does admit of a number of suits on the separate liabilities of the co-debtors, but a similar course of proceeding might be taken in a case of liability upon the equitable obligation only, for I apprehend that the obligation is several as well as joint. Besides, a consideration of the possible inconvenience of several suits in some cases should not, it appears, to me, have weight in construing the section. Express contracts making several debtors separately liable would be open to a similar observation, and the Civil Procedure Code provides a mode of preventing any injustice being occasioned by several suits.

“There are, I am aware, cases in which the doctrine of obligations arising out of implied contract has been applied more widely. Those for instance in which it has been decided that there is an implied contract to return money paid through mistake:—

that a party is at liberty to waive a tort and recover in respect of the wrongful act on the implied contract of the wrong-doer, and that an implied contract between judgment-debtors, existed, although the acts and circumstances giving rise to the liability adjudged precluded the presumption of promise or request. But in such cases it does appear to me that the obligations can be said to rest on implied contracts only by a pure fiction, and I think they must be considered to be simply obligations arising out of the general principles of justice and positively imposed: obligations merely *quasi ex contractu*. The intervention of a judgment can be no ground for the implication of a liability *ex contractu* when the acts of the parties from which the liability springs, do not present any ground for such an implication. At present, therefore, my opinion is, that it would be a strained construction to hold that claims in cases of this nature

were claims 'on contract' within the meaning of the section.

"For these reasons I am of opinion, that the obligation to contribute in the present case rests on an implied contract according to the tenor of the English decisions, and is therefore one to which the section is applicable. Consequently that the suit is cognizable by the Court of Small Causes."

A suit to recover money alleged to have been paid in respect of the plaintiff's share of rent on account of his co-tenant was held to be a suit for contribution and as such not cognizable by the Small Cause Court, 15 W. R., 52. But if a man request another to pay money for him there is an implied contract to pay the amount and the suit is cognizable, 7 W. R. 386. So is a suit by a co-sharer to recover from another co-sharer money recovered by him upon a decree alleged to be a joint property. 12 W. R. 372.

CAUSES NOT ACTIONABLE.

On grounds of public policy.

‘There is an implied assent on the part of every member of society, that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good. “There are,” says *Buller, J.*, “many cases in which individuals sustain an injury for which the law gives no action; as, where private houses are pulled down, or bulwarks raised on private property, for the preservation and defence of the kingdom against the king’s enemies.” Commentators on the civil law, indeed, have said, that, in such cases, those who suffer have a right to resort to the public for satisfaction; but no one ever thought that * * * common law gave an action against the individual who pulled down the house or raised the bulwark. On the same principle, viz., that a man may justify committing a private injury for the public good, the pulling down of a house when necessary, in order to arrest the progress of a fire, is permitted by the law.

‘Likewise, in less stringent emergencies, the maxim is, that a private mischief shall be endured, rather than a public inconvenience; and, therefore, if a highway be out of repair and impassable, a passenger may lawfully go over the adjoining

land, since it is for the public good that there should be, at all times, free passage along thoroughfares for subjects of the realm. And in American Courts it has been held, that if a traveller in a highway by unexpected and unforeseen occurrences, such as a sudden flood or heavy drifts of snow, is so obstructed that he cannot reach his destination without passing over the adjacent lands, he is privileged so to do. “To hold a party guilty of a trespass for passing over another’s land, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds a sanction in the rules of law. The temporary and unavoidable use of private property under the circumstances supposed must be regarded as one of those incidental burdens to which all property in a civilised community is subject.” “Highways” says *Lord Mansfield, C. J.*, in *Taylor, V., Whitehead*, “are for the public service, and if the usual track is impassable, it is for the general good that people should be entitled to pass in another line.”

‘As a general rule, the law charges no man with default where the act done is compulsory, and not voluntary, and where there is not a consent and election on his part; and, therefore, if either there be an impossibility for a man to do otherwise, or so great a perturbation of the judgment and reason as in pre-

sumption of law man's nature cannot overcome, such necessity carries a privilege in itself.

'Where two persons, being shipwrecked, have got on the same plank, but, finding it not able to save them both, one of them thrusts the other from it, and he is drowned; this homicide is excusable through unavoidable necessity, and upon the great universal principle of self-preservation, which prompts every man to save his own life in preference to that of another, where one of them must inevitably perish. So, if a ferryman overload his boat with merchandise, a passenger may, in case of necessity, throw overboard the goods to save his own life, and the lives of his fellow passengers.'—*Broom's Legal Maxims*, 4th Ed., 1—11.

Contracts, Agreements, or Covenants which are against Public Policy, are not enforceable.

'Where a party is not a free agent, and is not able to protect himself, a Court of Equity will protect him. Hence Equity will relieve against acts, done under duress, or under the influence of extreme terror or of threats. And it watches with great jealousy all contracts made by a person while under imprisonment; and if there is the slightest ground to suspect oppression or imposition, it will set the contract aside. And in like manner, circumstances of extreme necessity and distress may so entirely overpower free agency, as to justify the

Court in setting aside a contract on account of some oppression or fraudulent advantage attendant on it.

'An officer in the army or navy or other officer of the Government cannot assign his future accruing pay or other remuneration connected with the right to future services from him; because it is contrary to the honor, dignity, and interest of the state, that its servants should be in danger of being reduced to poverty, by anticipating those resources which were intended to place them in a suitable condition of respectability, comfort and efficiency.

'An agreement that a person appointed to a public office shall pay to the person appointing him the surplus of his fees beyond a certain annual amount, is contrary to public policy, and void; because he is considered to require his fees to support him in performing the duties of his office. And this applies to a person appointed by a corporation, where he is not their officer, though the individual members may not appropriate any part to themselves.

'Equity will not uphold assignments which involve champerty, or maintenance, or buying of pretended titles.

'Marriage brokerage contracts, which are agreements whereby a party engages to give to another a remuneration if he will negotiate a marriage for him, are void, as tending to introduce matches which are ill-advised and not based on mutual affection, and therefore

against public policy. And they are so utterly void, that they are deemed incapable of confirmation; and money paid under them may be recovered back again in a Court of Equity, whether the marriage is an equal or an unequal one.

‘The same rules are applied to bonds and other agreements entered into as a reward for using influence over another, to induce him to make a will for the benefit of the obligor; for such contracts encourage a spirit of artifice and scheming, most prejudicial to the moral tone of those in whom it exists; and they tend to deceive and injure others.

‘On a similar ground, secret contracts made with parents, or guardians, or other persons standing in a peculiar relation to another, whereby on a treaty of marriage, they are to receive a remuneration for promoting the marriage or giving their consent to it, are held void.

‘On the other hand, a contract is void, if it is expressly in restraint of marriage generally, or if it is so restricted that it is probable that it may virtually operate in restraint of marriage generally; as, that a woman shall not marry a man who has not an estate of 500*l.* a year, or shall not marry till fifty years of age, or shall not marry any person residing in the same town, or any person who is a clergyman, a physician, or a lawyer, or any person except of a particular trade or occupation.

‘So, contracts in general restraint of trade are void, as tending to discourage industry, enterprise, and just competition. But a person may be restrained from carrying on trade in or within a certain distance from a particular place, or with particular persons, or for a reasonable limited time.

‘Some contracts for the partial restraint of trade are upheld, because they are advantageous not only to the individual in favor of whom the restraint is inserted, but to the public also, who, instead of being thereby injured, derive advantage in the unstrained choice of able assistants which such a stipulation gives to the employer, and in the security it affords that the master will not withhold from his assistant’s instruction in the secrets of his trade and the communication of his own skill and experience, from any fear of afterwards having a rival in the same business. And hence a stipulation on the part of an assistant to a London dentist not to practise in London, will be enforced. But whatever restraint is larger than the necessary protection of the person with whom the contract is made, is unreasonable and void, as being injurious to the interest of the public, on the ground of public policy. And therefore a contract by an assistant to a London dentist not to practise in any of the places in England or Scotland where the employer might have

been practising before the expiration of the service, is void. But a covenant, on the sale of the business of a horse-hair manufacturer at a given place, not to carry on the same business within 200 miles of that place, is good.

‘Agreements for the suppression of criminal prosecutions are void, as tending to weaken the beneficial preventive influence of the law, by diminishing the certainty of punishment.

‘Simoniacal contracts are void, as contrary to public policy. Simony is the corrupt presentation of any one to an ecclesiastical benefice, for money, gift, or reward.

‘Where contracts are intended to carry into effect an immoral purpose (as in the case of a house let for a brothel,) even though that purpose do not appear on the face of the instrument, the courts will not enforce any of the stipulations therein comprised.

‘Considerations which are against the principles of justice, the doctrines of morality, or the rules, provisions, or policy of the law, are utterly void; it being a rule of both law and equity that *ex turpi contractu actio non oritur*. Hence, a deed executed in consideration of a future cohabitation between persons who are incapable of contracting legal marriage, is invalid. And a bond given to a woman as the price of prostitution is void in law. But where a bond is given for securing an annuity or a sum

of money for the support and maintenance of the person seduced, and not with any view to future cohabitation, a court of equity will not set it aside, even though she was a common prostitute.’—*Smith’s Compendium of the Law of Real and Personal Property*, 4th Ed., Vol. II., pp. 829, 856—72.

Miscellaneous Rulings.

The male members of a family cannot sue for the injury or insult which they have sustained indirectly in consequence of ill-treatment of certain female members of the family, if there was any remedy by suit for such grievance or dishonor, it was open to the women themselves.—1, *Agra Rep.*, A. C., 264, *Oodai*.

Any person is entitled to establish a market on his own land, and the owner of a neighbouring market has no right of suit for the loss which may ensue from the establishment of the new market.—6, *N. W. P.*, *High Court Rep.*, p. 104, *Kadernauth*.

Where an Overseer in the Public Works Department, who is prohibited by the rules of his office from entering into any trade or contracts with that Department, enters into an agreement of partnership for carrying on business under contract with the Department, such agreement is a fraud upon the public, and is therefore one which a Court of justice ought to treat as an absolute nullity.—11, *W. R.*, p. 441, *Sharoda Prosaud Roy*.

A suit founded on an admission of fraud, and seeking protection from the consequences of that fraud, cannot be maintained. "The Courts of justice are designed for the protection of honest suitors, and the enforcement of just claims. They are not available as machinery to aid in the carrying out of schemes of fraud. It is right that parties should know, in making secret arrangements in regard to their property for fraudulent purposes, such as defeating their creditors, that they are entering on a dangerous course, and that they must not expect the assistance of the Courts to extricate them from the difficulties in which their own improbity has placed them."—6, *W. R.*, p. 287, *Aloksoondry Gooptoo*.

A party should not expect redress from a Court of equity, justice and good conscience, when he avows before such Court that, granting all his intentions to be fraudulent, he has a perfect right to seek to render inoperative a contract into which he willingly entered.—11, *W. R.*, 313, *Kumolanath Sen*.

In a suit by the plaintiff, the adopted son of the defendant, for maintenance, on the ground that the defendant had driven him away and refused to maintain him, the defence was that the defendant had renounced the plaintiff in consequence of his having mixed in low society, and having given up his studies. *Held*, that according to the Hindu or Jain

law, a father is not bound to maintain a grown-up son.—IV., *B. L. R.*, App., 23, *Premchand Peparah*.

When a purchaser of land lies by for five years, allowing another person to occupy the land, and afterwards to sell it, he is estopped by his own conduct from afterwards claiming the land from a *bona fide* purchaser without notice.—1, *Ind. Jur.*, N. S., 266, *Mohesh Chunder Chatterjee*.

Plaintiffs who in a former case have allowed property attached as theirs by their creditors to be claimed and taken by the defendants, are estopped in a subsequent suit from making a contrary averment.—IV. *R.*, 1864, p. 58, *Erskine and Co*.

No suit for possession will lie against zemindar or any one holding a title under the zemindar; until the plaintiff has been recognized by the zemindar as tenant, or has been registered as such in the zemindar's sherista.—7, *W. R.*, p. 158, *Mooktakesi Dossee*.

A suit for arrears of rent cannot be maintained in respect of rent-free land until the land has been assessed and the rent rate determined.—4, *Agra Rep.*, R. A., 2, *Noor Ali*.

One lakherajdar cannot maintain a suit for the resumption of a plot of alleged lakheraj land within his lakheraj mehal, and force the defendant to prove his title.—7, *W. R.*, 363, *Kaim Khan*.

If a person does not oppose the

making of a road until its completion, he is not entitled to have it closed.—1, *W. R.*, 288, *Radha Nath Banerjee*.

A suit cannot be maintained to compel the defendants, barbers, to pare the nails of the plaintiffs, although the plaintiffs would lose caste by the loss of the service indicated at the hands of the defendants.—1, *W. R.*, p. 352, *Rajkisto Majee*.

A suit for specific performance to sell land will not lie if the plaintiff neglects to enforce his rights for a long time (in this case three years) after his rights under the contract for sale accrued. If he has any claim at all, it would be for damages against the person breaking the contract for loss sustained by the non-fulfilment thereof.—8, *W. R.*, p. 280, *Pureeag Singh*.

No man, acting with good faith, and believing that he has a ground for doing so, should be held liable because, upon his application, a Magistrate makes an order which, it afterwards turns out, ought not to have been made. Thus, where certain inhabitants of a village which was flooded applied to the Magistrate to open a bund and let out the water, and the Magistrate without jurisdiction made an order that the bund should be cut, and the bund was cut by Police officers, *Held* that the applicants were not liable for damages.—8, *W. R.*, p. 112, *Pureeag Singh*.

A party is not liable to damages

in respect of an attachment made under a warrant issued by a Court.—7, *W. R.*, p. 355, *Rajbullab Gope*.

Every man who considers that a criminal offence has been committed against him has a right to make a complaint before the Police or before the Magistrate, and it is not because he fails in proving the charge made by him that he is liable to an action for damages for defamation. In making such a complaint, the presumption is that he is pursuing the remedy given him by the law properly and in a legal manner, and he does not wrong and is not liable to suits except for making such a charge falsely and maliciously, and when there is not any reasonable or probable cause for making it.—5, *W. R.*, p. 282, *Brojonath Roy*.

Witnesses giving evidence judicially cannot be sued in a Civil Court for damages, though they certainly are liable to be punished in a Criminal Court for any false and malicious statement that they may make prejudicial to the character or life or liberty of any person.—5, *W. R.*, p. 134, *Mugnee Ram Chowdry*.

In a suit for damages caused to the plaintiff's land by the bursting of the defendant's bund, *Held* that the plaintiff was not entitled to damages, if the bund was made in a lawful manner, and if the breach was owing to no fault of the defendant.—2, *W. R.*, p. 43, *Gooroo Churn Mullick*.

A party is not entitled to recover any damages against the defendants who had been witnesses in a criminal charge against him, his proper remedy against those parties, if any, being to obtain leave of the Magistrate to proceed against them for perjury.—11, *W. R.*, p. 42, *Bishonath Rukshit*.

Plaintiff had obtained a decree to resume and assess certain land before held rent-free by defendant. There was considerable delay in assessing the rent during subsequent litigation. Plaintiff, having failed in a suit to obtain rent from the date of resumption, now sues in the Civil Court for the same thing in the shape of damages. It seems to us that, as defendant had a right to possession of the land subject to liability to assessment of rent, he was no trespasser, and a suit for damages will not lie.—4, *W. R.*, p. 69, *Brojo Nath Dutt*.

In a suit for compensation on account of damages done to plaintiff's reputation by defendant having, on the occasion of a theft in his house, given information to the police against plaintiff, who was acquitted by the Criminal Court—*held* that, as the accusation was made in good faith—*i. e.*, with good and reasonable cause (defendant having, in common with other villagers, suspected plaintiff, and having, on being asked by the Police, given them formal information),—it was not made with any malicious purpose.—12, *W. R.*, 402, *Rutton Sircar*.

In a suit to obtain damages for defamation contained in a letter written and sent by defendant to plaintiff, where the only damage alleged was the injury to plaintiff's feelings,—*Held*, that such injury was not in itself a ground for giving damages in a civil action. *Held*, also, that as the letter was received and read by the plaintiff alone, there was no injury save that which the plaintiff privately received from his feelings being hurt by the receipt of the letter.—10, *W. R.*, 184, *Komul Chunder Bose*.

If A having reasonable grounds for believing that B has stolen his property, prosecute him for theft, he performs a public duty and the acquittal of B is no ground for recovering damages in a civil suit against A.—6, *W. R.*, 245, *Mohendro Nath Dutt*.

If a plaintiff comes into Court with a monstrously exaggerated statement of injury sustained, a statement disproved by evidence and by the circumstances of the case, he is only rightly served if the Court dismisses his claim *in toto*.—8, *W. R.*, p. 476, *Thakoor Luleet Narain Deo*.

Damages cannot be claimed for mere abuse, or threatening language, without proof of any damage.—12, *W. R.*, p. 369, *Phoolbasee Koer*.

Though the law under the ordinary rules would not assist parties who have colluded to evade its provisions in restoring them to

their original *status*, yet relief may be granted, if public policy is promoted by so doing.—1, *Agra Rep. A. C.*, 71, *Ram Persaud*.

A defendant may plead the joint fraud of himself and the plaintiff as a bar to an action upon a contract which the plaintiff seeks to enforce by suit.—2, *Mad. Rep.*, 249, *A Seshaiya*.

No suit shall be brought to set aside an award under the Land Acquisition Act, 1870.—Section 58, *Act X. of 1870*.

When property is sold by public auction at a sale in execution of a decree, and the neighbour or partner has the same opportunity to bid for the property as other parties present in Court, a suit for the right of pre-emption does not lie.—1, *B. L. R., A. C.*, 105.

A had a right of way over B's land. He allowed B to erect a house on the pathway and enjoy it for 7 years. He then brought a suit to have the pathway re-opened by pulling down B's house. *Held*, A must be taken to have acquiesced in the interruption of his right of way, and his claim was such that a Court of equity and good conscience would not enforce.—1, *B. L. R., A. C.*, 213—*Benemadhub Doss*.

A, the holder of a service tenure subject to a quit rent to the zemindar, died, leaving his rent for the last three years unpaid. B, his son, succeeded him in the tenure. *Held*, that the zemindar could not sue B as A's

successor in the tenure for A's arrears of rent. Jackson, J., in delivering judgment, observed "If the landlord neglected to realize the rent from the former incumbent year by year, and should seek to recover the arrears of several years at once from the new jaghirdar, he will necessarily be deprived of the frauds which will enable him to perform the service, and to support himself as originally contemplated. It appears to us, therefore, that the suit against the jaghirdar, on account of arrears, unpaid by the predecessor, ought to fail. Plaintiff, it should be observed, has not sued the defendant, as the legal representative of the late jaghirdar, so as to make him liable to satisfy the arrears out of any assets other than the tenure which may have come to the defendant, but sues him simply as jaghirdar."—*Rajah Nilmani Singh*, 1, *B. L. R., A. C.*, p. 195.

A sued B to enforce registration of a pottah, on the allegation that the Registrar had refused registration, on the ground that B denied before him the execution of the deed. *Held*, that under Act XX. of 1866, a suit would not lie. A should have proceeded under section 83 of the Act.—*Tulsi Sahee*, 11, *B. L. R., A. C.*, 105.

When a son dies in his father's life-time leaving no estate whatever, his widow has no such rights to maintenance as can be enforced at law.—*Khetramoni Dosi*, 11, *B. L. R., A. C.*, 15.

CIRCULAR ORDER NO. 13.

Dated Calcutta, the 12th May, 1874.

QUESTIONS having been raised in connection with the Court Fees' Rules, published in the *Calcutta Gazette* of the 25th February 1874, the Court are pleased to direct the issue of the following instructions in explanation of the effect of the Rules:—

High Court,
English Department,
Civil.

I.—Rules under Clause 1, Section 20, Act VII. of 1870, declaring the fees chargeable for serving and executing processes in the Civil Courts.

(1.) The summons and subpoena to defendants (or respondents) and witnesses, on the issue of which a fee is provided by Article 1, Parts II., and III., are those contemplated by Sections 48, 345 and 149 of the Code of Civil Procedure. They may in either case, therefore, by law contain the names of more than one defendant or witness, and the rules do not at present authorize the imposition of a separate fee on the respective copies prescribed by law to be served on the several persons named therein. If such fee be found necessary, the rule will be reconsidered.

(2.) This explanation does not apply to warrants to bring parties or witnesses before the Court, not being execution processes. In such cases a separate warrant will be issued against each person to be arrested, and a separate fee under Article, Parts II and III, as for an "order not elsewhere specified in the Table of Fees," is to be charged for every such process.

(3.) The processes, provided for in Article, 5, Parts II and III, are exclusively processes directed against a defendant after judgment and in course of execution of a decree.

(4.) Article 2, Parts II and III, which prescribes the fees leviable in respect of commission and of the remuneration of the Commissioner, does not affect the rules laid down in Circular Order No. 10, dated 31st May, 1873, except in so far as the rules direct the charge of a fee on every commission. Clause *a* applies to all commissions. Clause *b* only applies to the cases in which an officer of the Court specially appointed and paid by Government is employed. The charge for the services of such an officer is properly

a Court fee payable to Government, which is therefore to be paid in stamps; and to such fees alone the rules apply. But when the Commissioner is a person not receiving pay from Government in respect of his employment as a Commissioner, the rules of remuneration prescribed by Circular Order No. 10, above referred to, apply, and the Commissioner will be paid in cash.

(5.) If the services of peons are required to serve any process which an Amec or Commissioner is authorized to issue, a fee will be charged under the appropriate heading in the rules. The employment of peons as personal attendants on the Commissioner was not contemplated and is not authorized.

(6.) The amount of fee, when an officer is deputed to put a party in possession under a decree, is to be determined, according to circumstances, either under Article 1, or Article 2, at the discretion of the Court. If the delivery of possession is merely a formal act and a peon can be employed, the fee as for an order would be charged under Article 1; but if the transaction is more complicated (as involving enquiry or the making of an inventory, or the like), a commission to a superior officer would more properly issue and a fee would be chargeable accordingly.

(7.) In the event of an excess deposit for a commission, or of a compromise rendering it unnecessary to execute the commission at all, the parties will be entitled to a refund in cash of the excess, or, as the case may be, of the whole of the fees deposited under clause *b*, but not of the fee under clause *a* in any case. The Accountant-General will issue separate instructions as to the form of voucher that will be necessary to obtain such refunds.

(8.) Article 3, Parts II. and III., prescribes the fee leviable on every process of attachment of property by notice or proclamation. One fee only is chargeable under this article for each process irrespective of the number of items of property therein contained. Where copies have to be issued, no separate charge can be made under the rules as they stand.

(9.) The rules laid down in the note to Article 4, Parts II. and III., must be followed. Refunds, where properly claimable under this note, will be made in such mode as may hereafter be settled in communication with the Accountant-General.

(10.) As there are no stamps of less denomination than one anna, fractions of an anna are to be abandoned under the rules.

(11.) The heading of the rules shows that they have no application to Revenue Officers acting otherwise than in a judicial capacity, or, in other words, than when they act as Revenue Courts.

(12.) The following Circulars Orders are hereby declared cancelled or modified :—

In addition to [other] fees, the actual charge which must be incurred if it is necessary to employ boats or cross-ferries is to be levied from and paid by the person at whose instance the process is issued, before issue of the process to the person who carries the process—

Cancelled or modified :—Circular Order No. 31, dated 25th September 1867, is cancelled, except paragraph 5 which will continue in force and for convenience of reference is reproduced in the margin. Circular Order No. 20, dated 25th June 1872, is wholly cancelled, as it is superseded by Rule III. of the new rules. Paragraph 2 of the Circular Order No. 10, dated 31st May 1873, is in so far affected by the

rules that a fee is now to be charged under Clause *a*, Article 2, Parts II. and III., upon every Commission. Circular Order No. 17, dated 2nd August 1873, is superseded by Rule III., so far as refers to the affixing of stamps to the process. In cases where application is made for the issue of process beyond the jurisdiction of the Court, the application will bear the proper stamp, and an endorsement will be made on the process to the effect that the proper stamps have been affixed to the application. Circular Order No. 19, dated 6th August 1873, is superseded by Article 6, Parts II. and III. of the rules, and is wholly cancelled.

II.—Rules under Clause 2, Section 20 of the Court Fees' Act, declaring the fees chargeable in the Courts of Magistrates.

(13.) Rule I., Clauses 1 and 2, prescribes the fees leviable upon warrants of arrest and summonses. The process is one whether one or more persons be named therein and whether such persons reside in one place or not, but an additional fee of 4 annas is chargeable in respect of every person exceeding one named in a warrant, and an additional fee of 4 annas is chargeable in respect of every additional person, not being the second person of more than two residing in the same village, named in a summons. Thus, if the summons include one person residing in village A,

and a second person residing in village B, the additional fee is chargeable in respect of such second person.

(14.) Magistrates may follow the principle of Rule III. of the rules under Clause 1, Section 20, for the Civil Courts, in realizing Court fees in Criminal Courts.

(15.) The charge for boat hire, when it has to be incurred, is not a Court fee realizable by stamps. There is nothing in the rules to introduce a change in the existing practice, and the charge must be borne as heretofore by Government.

III.—Rules under Clause 3, Section 20, Act VII. of 1870, for the remuneration of persons employed in the service of processes.

(16.) The intervals and rate of increment which govern the increase of salaries of the establishment to which the officer belongs are applicable under these rules and will take effect from the date of their promulgation, except when the application of this order will reduce the pay of present duly qualified peons.

(17.) The establishment of peons of a Subordinate Judge's Court when the Subordinate Judge is also Judge of the Court of Small Causes is to be kept distinct from the Small Cause Court establishment.

IV.—Rules under Section 22, Act VII. of 1870, for calculating the number of peons to be employed by Civil Courts and Magistrates.

(18.) Clause 2, Section 20 of the rules clearly indicates that only processes in cases of offences, other than offences for which police officers may arrest without warrant, are to be served by peons employed under the Court Fees' Act.

By order of the High Court,

(Sd.) H. J. S. COTTON,

Officiating Registrar.

The plaintiff, therefore, can seek his remedy, as already observed, by applying for a partition, in which partition a proper compensation will be made to him for any lands which the defendant may have improved from his own resources."—C. H. C. (Kemp and Glover J. J.)—The 25th April 1872—Gokool Kishen Sen—XVIII. W. R. p. 12.

Suit for Demolition of a Wall.

Where two parties were joint owners of land, and one of them erected a wall upon the land, without obtaining the consent of his Co-sharer,—*Held* that the Court would not interfere to order the demolition of the wall when there was no evidence to show that injury had been done to the co-tenant of the building by its erection—Lalla Biswambhur Lall, 3 B. L. R. App. 67.

Partition—Privacy of another's family.

In partition, each shareholder may retain, as a part of his share, all those lands he may have separately held upon which he may have erected buildings or planted fruit trees, or at his own expense dug a tank, or which in course of his separate possession he may have substantially improved. But those who by this mode of divi-

sion may be found to hold more than would belong rightly to thier legal shares, shall make up the difference to those who thus hold less, from their shares in other lands held jointly, or by paying compensation in money, or by giving over other lands or agreeing to pay rents for their thus larger shares.

Co-partners may, on partition, be allowed to retain possession each of such joint lands as they may have taken separate possession of with the express or implied consent of all or at least of a majority of the co-partners.

With reference to the circumstances of domestic life in India, no one has a right to build an upper story, so as to intrude on the privacy of the females of another's family.—C. H. C. (Bayley and Pundit J. J.)—The 14th April 1866, Sreenath Dutt, V. W. R. 208.

Deeds and Contracts invalid on the ground of constructive Fraud practised by persons standing in a Confidential Relation to the Parties sought to be bound by such deeds or contracts.

Where a reasonable confidence is reposed in another person, or a peculiar influence is possessed by him, in consequence of standing in a confidential relation, or

where a person, by being employed or concerned in the affairs of another, has acquired a knowledge of his property, and he makes use of that confidence or that influence or that knowledge to obtain an advantage to himself at the expense of the party confiding in him or under his influence or in whose affairs he is concerned, he will not be permitted to retain any such advantage, however unimpeachable the transaction would otherwise have been.

Thus,

1. Contracts and conveyances whereby benefits are secured by children to their parents, or to persons who stand in *loco parentum*, or by young persons to their relations who had an influence over them, if not entered into with scrupulous good faith, and reasonable under the circumstances, will be set aside, unless third persons have acquired an interest under them. And when a child, recently after attaining majority, makes over property to the father, without consideration, or for an inadequate consideration, equity will require the father to be able to show that the child was really a free agent, and had adequate and independent advice. And if an estate held in trust for a father

for life, the remainder to his son in fee, is sold by the father and son immediately on the son coming of age, and the whole purchase money is paid to the father, there, if the assistance of the Court is required by the purchaser to complete the transaction, its straightforwardness must be proved.

2. During the existence of guardianship, the relative situation of the parties occasions a general inability to deal with each other. And courts of equity will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased, if the intermediate period is short; especially if all the duties attached to the office have not ceased, or if the estate still remains in some sort under the control of the guardian; unless the circumstances demonstrate the fullest deliberation on the part of the ward, and the most absolute good faith on the part of the guardian. But when the guardianship has entirely ceased, and a full and fair settlement of all transactions growing out of it has been made, and a sufficient time has intervened to allow the ward to feel completely independent of the guardian; there is then no objection even to a bound-

ty being conferred upon the latter.

3. The same principles are applied to persons standing in the relation of quasi-guardians or confidential advisers or ministers of religion, and to every case where influence is acquired and abused, where confidence is reposed and betrayed.

4. A solicitor is not incapable of contracting with his client; but, as the relation must give rise to great confidence in the solicitor, or to very strong influence over the client, the relation must be dissolved before the contract, or the whole onus of proving the fairness and propriety of the transaction will be thrown on the solicitor, or he must show that the client had sufficient advice and assistance to relieve him from the pressure arising from the relation of solicitor and client, and that he has taken no advantage of his professional position, but that he has done as much to protect the client's interest as he would have done in the case of the client dealing with a stranger. And a solicitor who is an agent for a sale cannot become the purchaser without full explanation to the parties interested of all the circumstances of the sale and of the value of the property; because his duty and his interest are

in conflict. And if a solicitor can show that he is entitled to purchase, yet if, instead of openly purchasing, he purchases in the name of a trustee or agent, without disclosing the fact, no such purchase can stand. And in the case of a solicitor taking a security or a purchase from his client, it is incumbent on the solicitor to prove the advance of the money to the client by some other evidence than the Deed of Security or Purchase. As a general rule, a solicitor shall not accept a gift, or, in any way whatever, in respect of the subject of any transaction between him and his client, make a gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled. On the above principle, an agreement on the part of a client to allow a solicitor a commission of so much per cent. on a fund in Court, as a remuneration for recovering the fund or employing another solicitor to recover it, is void, as contrary to the policy of the law. And an agreement by a client to allow his solicitor interest on his Bill of Costs, cannot be maintained—at all events, not unless the solicitor informed the client that the law allowed no such charge, or the client

acquiesced after the termination of the relation, and after proper advice upon the subject. But a deed executed by a client in favor of his solicitor, if voidable, may be confirmed by the will of the client.

An agreement between a solicitor and client, that a gross sum shall be paid for costs for business already done, is valid. But an agreement to pay a gross sum for business hereafter to be done is void. And if a solicitor takes a gross sum for his services, without an account, he should preserve evidence of the fairness of the agreement, and that the client had good advice, or had full opportunity and capacity to judge for himself.

5. Similar rules apply to the case of a medical adviser and his patient.

6. An agent will not be permitted to reap any advantage by becoming secret vendor or purchaser of property which he is authorised to buy or sell for his principal. So that if an agent sells his own property to his principal as the property of another, without disclosing the fact, or if an agent purchases the goods of his principal in another name, however fair the transaction may be, the principal may either repudiate it, or may claim any

profit made by the agent, because an agent will not be allowed to place himself in a situation which under ordinary circumstances would tempt a man to do that which is not the best for his principal. And if an agent employed to purchase for another purchases for himself, he will be considered as the trustee of his employer, at the option of the latter. And in all transactions directly and openly entered into between principal and agent, the utmost good faith is required; so that the agent must not conceal any facts within his knowledge which might influence the judgment of his principal as to price or value.

7. A trustee is not allowed to partake of the bounty of the party for whom he acts, except under circumstances which would make the same valid if it were a case of guardianship.

Trustees, mortgagees, and executors, with powers of sale, cannot buy the trust estate from themselves, or in other words they cannot sell it to themselves; for although they may vest the estate by conveyance in themselves as purchasers, or in a nominal purchaser as a trustee for them, yet equity would not allow such a purchase to stand, unless it should prove beneficial to the cestuisque trust. And if a pur-

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Mr. T. Raghavendra Row, <i>Judicial She-</i> <i>ristadar Shimogah</i>	5	Dec. 1874.



CALCUTTA HIGH COURT.

The 24th January, 1874.

FULL BENCH.

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. B. Kemp, Louis S. Jackson, F.A. Glover, and C. Pontifex, *Judges.*

LUKHEE KANT DOSS CHOWDHRY
(Plaintiff) Appellant,

vs.

SUMEROODDI TUSTAR and others
(Defendants) Respondents.

*Suit for Rent under a Kuboolent—
Kuboolent disproved.*

Where a landlord sues a ryot for arrears of rent alleged to be due under a kuboolent, and the Court finds that such kuboolent has not been executed by the ryot, but it appears, notwithstanding, that the ryot occupied the land under the zemindar, the landlord's right to have a further trial of the question whether any rent, and how much, is due, will depend upon the claim stated in the plaint. If that claim is in the alternative and the ryot thus has notice that on failure to prove the kuboolent the landlord will claim rent for the occupation of the land, the landlord is entitled to have that issue tried. But if a claim for rent on account of such occupancy is not in the plaint, the landlord is not so entitled.

It is in the discretion of the Court to amend the plaint or the issues, and where the omission has been from inadvertence or mistake, it would generally be proper to do so.

This case was referred to the Full Bench on the 18th July 1873 by Jackson and Dwarkanath Mitter, J.J., with the following remarks:—

JACKSON, J.—We are under the necessity of referring this case for the judgment of the Full Bench.

The question which requires to be settled by an authoritative ruling, is whether a landlord having sued a ryot for arrears of rent alleged to be due under a kuboolent, and the Court having found that such kuboolent had not been executed by the ryot, but it appearing, notwithstanding, that the ryot occupied the land under the zemindar, whether the landlord is entitled to have a further trial of the question whether any rent, and how much, is due on account of the ryot's occupation of such land. It has been held that in such circumstances the landlord is entitled to recover the rent which appears to be due to him otherwise than under the kuboolent, in several cases, one in Sutherland's Reports for 1864, page 12, Act X. Rulings; another in X., Weekly Reporter, page 81; another in XIX., Weekly Reporter, page 263; and in a still more recent case, in which a similar opinion appears to have been expressed, although the case is not yet reported, by the present Chief Justice in Special Appeal No. 945 of 1872, decided on the 14th May 1873.*

On the other hand, we have repeated rulings in Marshall's Reports, pages 560, 47, 268, 57 and 28, and in XII., Weekly Reporter, page 317.

The judgment of the Full Bench was delivered as follows by:—

COUCH, C. J.—The question referred is whether a landlord having sued a ryot for arrears of rent

* Since reported at 20. W. R. 64.

alleged to be due under a kubooleut, and the Court having found that such kubooleut had not been executed by the ryot, but it appearing, notwithstanding, that the ryot occupied the land under the zemindar, the landlord is *entitled* to have a further trial of the question whether any rent, and how much, is due on account of the ryot's occupation of such land."

Whether the landlord is entitled to this or not, depends in our opinion upon the claim which is stated in the plaint. If the claim is in the alternative, and thus the ryot has notice that the landlord, if he fails to prove the execution of the kubooleut, will claim rent for the occupation of the land, we think an issue ought to be framed to try whether any rent and how much is due on account of the occupation, and that the landlord is entitled to have that issue tried. If any rent is due, the landlord ought to be allowed to recover it. It is not forfeited by his making a false claim upon a kubooleut, and he should not be made to bring two suits when the questions between him and the ryot can be determined in one.

But where a claim for rent on account of the occupation of the land is not made in the plaint, we think the landlord is not entitled to have the question tried whether any, and how much, rent is due. "The determinations in a cause should be founded upon a case

either to be found in the pleadings, or involved in, or consistent with, the case thereby made."—*Eshan Chunder Singh, v. Shama Churn Bhutto*, XI., Moore's I. A., 20.* "The state of facts and the equities and ground of relief originally alleged and pleaded by the plaintiff are not to be departed from."—*Id.*, 24.

It is in the discretion of the Court to amend the plaint or the issues, and to allow it to be tried. And where the omission to make the claim in the plaint appears to have been from inadvertence or by mistake, it would be proper to do so. "If, by inadvertence, or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in dispute."—*Hunooman Persaud Pandey, v. Mussammut Bahooce Muuraj Koonwuree*, VI., Moore's I. A., 411.

But where there is reason for thinking that the omission was deliberate, it would generally not be proper.

The landlord may then be justly left to bring a fresh suit, and to loose any part of the rent the suit for which would be barred by the law of limitation. This appears to be the opinion of the High Court at Bombay, IX., B. H. C. Reports, 1. When a Court of first instance, in the

* 6, W. R., P. C., 57.

exercise of its discretion, allows the question to be tried, the reason for doing so should be distinctly stated. An arbitrary exercise of the power might be a ground of appeal. In the suit in which this reference has been made, the landlord was clearly not entitled to have the question tried. An issue raising it had, indeed, been framed by the first Court, but the issue whether the co-sharer ought to have been made a defendant was decided in favour of the landlord on the ground that his suit was based on the kubooleut. The two claims could not be properly joined in the suit, as upon the second claim other persons ought to have been made defendants.

We wish also to remark that where as in Special Appeal No. 915 of 1872,* the defendant admits a sum to be due for rent, the Court may rightly in our opinion give a decree for it, irrespective of the claim made in the plaint. This is all that was decided in that case. It was there said by the pleader for the appellant, in a general way, that there were decisions in Marshall's Reports against this being done, but the references to them were not given, and it now appears that none of the decisions go so far as this.

We think in this appeal the question put to us should be answered in the negative, and the appeal should be dismissed with costs.

* 20, W. R., 64.

CALCUTTA HIGH COURT.

The 19th February, 1874.

The Honourable J. B. Phear and
G. G. Morris, *Judges.*

G. H. GRANT (*Plaintiff*) *Appellant,*
vs.

BYJNATH TEWARREE (*Defendant*) *Respondent.*

Ancient Documents—Proof.

It is not because a document bears a very important looking seal and on the face of it purports to be more than 30 years old, that therefore it is not necessary to prove it while the party to be affected by it does not admit it. In the case of a document of that sort, it is just as much incumbent upon the person who relies upon it to prove it as if it were a document appearing to have been executed only the day before the trial.

PHEAR, J.—The learned pleader who appears on behalf of the respondent has felt himself obliged to admit very fairly that the Subordinate Judge has treated certain documents as if they were evidence between the parties; and he is unable to contend that these documents were properly proved, namely, the sunnud and a certain number of farkhuttees. But he has urged upon us that these have not materially influenced the judgment of the Lower Appellate Court in regard to his estimate of the plaintiff's case.

We are unable, however, to take this view. It seems to us that if the Subordinate Judge was right in treating the sunnud as evidence between the parties, *i. e.*, as if it had in truth been proved, and so was fit to be taken as evidence between

the parties, it must have had important weight given to it in this case. It is almost impossible to suppose that the Subordinate Judge was not influenced in his view of the plaintiff's case by the belief which he undoubtedly held that this sunnud was evidence between the parties. It appears, however, that this sunnud was in no respect proved and was not admitted by the plaintiff. The Judge remarks that inasmuch as it is 30 years old, the defendant could not be expected to prove it. But we need hardly say that this remark must have been made under considerable misapprehension. It is not because a document bears a very important looking seal and on the face of it purports to be more than 30 years old, that therefore it is not necessary to prove it while the party to be affected by it does not admit it. In the case of a document of that sort, it is just as much incumbent upon the person who relies upon it to prove it as if it were a document appearing to have been executed only the day before the trial. The only difference between the two cases is this, namely, that the nature of proof is different in them. In order to prove the authenticity of this sunnud, the defendant ought at least to have adduced such evidence of the custody of the document and of payment of rent according to its terms, or of other acts done in accordance with it, as he was able to bring. If his

case be a true one, he must have evidence in his power of that kind. He brought none of it. And consequently the piece of paper decorated with seal which he calls a sunnud of the Rajah so many years old, must remain, as far as this trial is concerned, simply a piece of paper without being available as evidence on his behalf.

So again with regard to the far-khuttees, the defendant cannot ask to have them looked at and treated as evidence against the plaintiff unless he proves them to be authentic receipts binding upon the plaintiff. That is, he must give such evidence as will satisfy the Court that they are receipts given on behalf of the plaintiff by some one able to bind him. There is no such evidence on the record with regard to a considerable number of the far-khuttees, and therefore these ought not to have been treated as evidence.

We repeat, it seems to us, that the Subordinate Judge was influenced in his view of the plaintiff's case by this evidence. And as we think that he ought not to have treated these materials as evidence, and ought not to have allowed them to influence his mind, the decision of the Lower Appellate Court must be reversed and the case remanded for re-trial. And we think it right to direct that upon remand the case be transferred to the Court of the Judge for re-trial.

The appeal will be re-tried in its entirety by the Judge.

Costs must abide the event.

CALCUTTA HIGH COURT.

The 6th February, 1874.

The Hon'ble J. B. Phear and G. G. Morris, Judges.

KHUDEERUN LALL (*Judgment-debtor; Appellant,*
versus

CHUTTERDHAREE LALL (*Decree-holder*) Respondent.

Mode of Service of Summons—Act VIII. of 1859, Sec. 55.

Under section 55 of Act VIII. of 1859, there is no proper service unless it be the fact that the defendant is actually dwelling in the house upon which the summons is fixed and cannot after diligent search be found, in other words, is keeping out of the way to avoid service.

A judgment-debtor, applying to set aside an *ex parte* decree, should be called upon to give his evidence or to make out a *prima facie* case.

PHEAR, J.—We think that there has been no trial of the matter of the judgment-debtor's application in this case. The Judge says:—“After recording evidence touching the service of the notice, I am satisfied that the matter was properly conducted, and that the applicant's non-appearance was entirely his own fault, and that the delay gained thereby was purposely about to postpone the payment of a just debt. The service of the summons being proved to my satisfac-

tion, I decline to set aside my judgment of the above date.”

But the depositions of only two witnesses are to be found upon the record, namely, Bunwaree Lall and Bullee Dhanook. And certainly the testimony of these witnesses not only does not afford evidence of service, but goes a long way to show that there was not effectual service.

We need hardly remark that in all cases service of summons upon a defendant should, if possible, be personal. There is a specific enactment in the Civil Procedure Code to that effect. Then Section 55 Act VIII. of 1859 says that “when the defendant cannot be found, and there is no agent empowered to accept the service, nor any other person on whom the service can be made, the serving officer shall fix the copy of the summons on the outer door of the house in which the defendant is dwelling; and, if he is not dwelling in the place mentioned in the summons, the serving officer shall return the summons.”

Under that Section there is no proper service unless it be the fact that the defendant is actually dwelling in the house upon which the summons is fixed and cannot after diligent search be found; in other words, is keeping out of the way to avoid service.

Now Bunwaree Lall and the other witness do not even pretend to say that they were present at

the time when the notice was fixed on the dwelling-house of the defendant. They were not in a position to say whether any attempts were made to find him or not. Nor does either of them say that to his knowledge the defendant was dwelling in that house at that time and on that very day.

The account of the defendant is that he was not dwelling there at that time; that he was elsewhere upon duty. Therefore the cardinal point to be determined in this case is, whether or not the defendant was actually dwelling in the house at the time when the summons was fixed upon it.

There is another point to be determined,—whether or not, if he was dwelling there, he could be found by reasonable efforts made for that purpose.

Neither of these witnesses speak to either the one or the other of these points. In fact they speak but second-hand altogether: they only say that subsequently to the notice being fixed they saw it hanging on the house. The peon who was charged with the duty of effecting the service and the man who went with the peon to point out the house, and who therefore was possessed with the knowledge or ought to have been possessed with the requisite knowledge as to whether it was the house in which the defendant was then dwelling, are neither of them examined.

Further than this, there is

enough in the evidence of one of the witnesses to suggest at any rate the probability that the defendant was elsewhere at the time.

On the whole, this evidence, as we have already said, falls very far short indeed of proving service; it rather indicates that there was no proper service of summons.

On the other hand, it was incumbent upon the judgment-debtor in an application of this kind to make out his own case. He has not been examined; and if we thought that this omission was attributable to his own fault, *i. e.*, that he intentionally withheld himself from being examined, we should be able, even on this record, to decide this case finally. But it appears to us from the judgment of the Lower Court that the petitioner was not in fact called upon to give his evidence or to make out a *prima facie* case. The Court seems to have been satisfied with his petition, and upon that ground alone proceeded to inquire into the merits of the case of the other side. This we think is wrong. In truth there has been no proper trial of the matter brought before the Court upon the application of the judgment-debtor, and therefore the decision of the Judge must be reversed and the case remanded for rehearing.

The costs will abide the event.

CALCUTTA HIGH COURT.

The 23rd February, 1874.

FULL BENCH.

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, J. B. Phear, W. Ainslie, and G. G. Morris, *Judges*.

BEHAREE LALL MULLIC and another
(*Defendants*,) *Appellants*,
versus

INDER MONEE CHOWDRAIN (*Plaintiff*) *Respondent*.

Sudras—Ceremonies in adoption.

Amongst Sudras in Bengal no ceremonies are necessary to make a valid adoption, in addition to the giving and taking of the child in adoption.

This case was referred to the Full Bench on the 27th November 1873 by Couch, C. J., and L. S. Jackson and J. B. Phear, J.J., with the following remarks:—

COUCH, C. J.—We think that the following question of law arises in the case, *viz.*, whether amongst Sudras in Bengal, in addition to the giving and taking of the child in adoption, any, and if any, what ceremonies are necessary to make a valid adoption; and if any ceremonies are necessary, at what time they must be performed. We think the decision on this question in the IV. Bengal Law Reports, 162,* should be considered by a Full Bench, and therefore we refer it for decision by a Full Bench. The further hearing of the case will

be adjourned till the answer to the question is returned.

The judgment of the Full Bench was delivered as follows by—

COUCH, C. J.—The question referred to us for decision is “whether amongst Sudras in Bengal, in addition to the giving and taking of the child in adoption, any, and if any, what ceremonies are necessary to make a valid adoption; and if any ceremonies are necessary, at what time they must be performed.” We are not asked to decide whether, according to the received law in Bengal, proof of the performance of the *datta homam* is essential to establish a valid adoption in a Brahmin family. It has been held by the High Court at Madras in *V., Singamma, v. Vinjamuri Venkatacharhe, IV.*, Madras High Court Reports, 165, not to be essential; but a Division Court of this Court held in the case in IV. Bengal Law Reports that it was.

The Madras decision was not noticed either in the argument or the judgment. It not being necessary to decide this question in the appeal in which this reference is made, we do not propose to do so, and shall only consider what is the law of Bengal in the case of Sudras.

We refer first to the *Dattaka-Mimansa*. In Section 1 the author treats of by whom adoption may be made. Having stated in Verse 15 and the following verses when a woman may adopt, he says in Verse 24 :—“It must not be argu-

* 13, W. R. Civil, 168.

ed that since under a text of Cannaka the employment of a priest is according to the approved doctrine the *homa* may be completed by his intervention; for although that were completed, still would the adoption (by the woman) be imperfect, since she is not competent to perform the prayers requisite for the same." And in Verse 25 the prayers are specified. This is an assertion that notwithstanding the incompetency of a woman to perform the requisite prayers, there may be a complete adoption by her, and that this is not by reason of the intervention of a priest. The Sudras being also incompetent to perform the prayers specified, the author notices their case; and in verse 26 says:—"Nor does thus the want of power of Sudras follow, for their ability (to adopt) is obtained from an indication (of law) conclusive to that effect in this passage:--'Of Sudras from amongst those of the Sudra class.' By this Vachaspati is refuted, who says:--'Sudras are incompetent to affiliate a son, from their incapacity to perform the sacrament of the *homa* and prayers prescribed for adoption.' " The text of Cannaka thus referred to is given in Section 2, Verse 74. When the author says Vachaspati is refuted, he plainly affirms that the incapacity of Sudras to perform the *homa* and the prescribed prayers does not make them incompetent to adopt. He then in Verse 27 states in what manner the com-

petency is produced. It treats of adoption by woman and concludes:—"Therefore since by this passage (of woman and Sudras without prayers) a dispensation with respect to prayers is established, the adoption (of the woman in question) would be valid without prayers; like their acceptance of any chattel."

Thus we have it distinctly laid down that Sudras may adopt, and that an adoption by a Sudra without prayers is valid, because there is a dispensation with respect to prayers. It would be surprising if any passage from this author could be produced which would be an authority for saying that an adoption by a Sudra without the ceremonies is invalid.

In Section 5 the author treats of the mode of adoption. A Sudra is expressly mentioned only in Verse 29, where it is said that he ought to bestow as a gratuity on the officiating priest "the whole even of his property: if indigent to the extent of his means." In order to make the author consistent, the rules prescribed in this Section must be understood as subject to the qualification that the person adopting is capable of observing them. It is not to be supposed that the author intended to contradict what he had before laid down about women and Sudras; and the concluding Verse 56—"It is therefore established that the filial relation of adopted is occasioned

only by the proper ceremonies : of gift, acceptance, a burnt sacrifice, and so forth, should either be wanting,—the filial relation even fails” —must be understood as only applying where there is a capacity to perform the ceremonies. To give any other meaning to it would make the author absolutely contradictory. In one part of his work he would be saying that a Sudra can adopt, and in another that an adoption by a Sudra is invalid, because ceremonies have not been performed which he was incapable of performing, and which the author had said he was exempted from performing. The doctrine in the Dattaka-Chandrika, which is preferred in Bengal, does not differ from this. On the contrary, Verses 29 and 32 of Section 2 support it.

The text of Manu quoted in Section 5 Verse 3 must be understood as applying to those who are capable of observing the ordained rules, and not to Sudras. The decision in IV. Bengal Law Reports, Appellate Jurisdiction, 162,* which made this reference necessary, is based upon a passage in the Vyavastha Durpana, 2nd Edition, 875, where the author quotes as an authority for what he lays down a passage from the Dattaka-Nirnaya, but it appears that the whole of the sentence is not given. After “a Sudra also should act in like manner” are the words “and even without the performance of *homa*, &c., the

adoption is valid.” Thus the authority given by Shama Churn Sircar for his position proves to be no authority for it, but the contrary.

The decision appears to us to be unsupported by any authority. 2, Strange, 89, may be cited as a contrary authority. The notoriety alluded to at page 170, if the practice had a modern origin, as is probable, would not be a sufficient foundation for a rule of law. We think we ought to overrule that decision, and answer the question put to us by saying that amongst Sudras in Bengal no ceremonies are necessary in addition to the giving and taking of the child in adoption.

CALCUTTA HIGH COURT.

The 10th February, 1874.

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. A. Glover, Judge.

SREENATH CHATTERJEE (*one of the Defendants*) Appellant,

versus

KYLASH CHUNDER CHATTERJEE (*Plaintiff*) Respondent.

Arbitration Award—Act VIII. of 1859, Sec. 325 and Sec. 327.—Finality.

Where the Court files an arbitration award and passes a decree, that decree is, by the terms of Section 327, final. Section 327 puts an award filed under it in the same position as an award filed under Section 325.

COUCH, C. J.—In this case, there having been a reference to arbitration under the power given by Sec-

* 13, W. R. Civil, 168.

tion 326 of Act VIII. of 1859, an application was made to the Moonsiff under Section 327, which seems to have been, as required by that Section, numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants, and the Moonsiff gave judgment as in a suit. He said that the plaintiff brought the suit on the allegation of the appointment of arbitrators and the award being made, and asked to have the award filed. He considered the objections which were taken before him to the final award, and decided that the objection that more than six months had elapsed from the date of the award before the application was made to file it was not valid, and held that it was right that the six months should be calculated from the time when the plaintiff was furnished with the award, and when he was in a position to make an application to file it.

Certainly, as regards the merits of the case, it would be proper to allow the plaintiff six months from the time when the arbitrators furnished him with the award, and he could take steps to have it enforced. It would not be right, when they refused to give the award for more than six months, that he should be precluded from enforcing it under Section 327. We should think, if it were necessary to decide that question, that the word "date" does not mean the day written in

the award, as when it was made, but the time when it is given to the parties, when it becomes an award and is handed over to them, so that they may be able to give effect to it. But for the reasons which we shall give, we need not decide this point.

The Moonsiff determined that the award should be filed, and made a decree in accordance with its terms. It is now said that the award is not final, and is therefore not valid. This objection does not appear to have been taken before the Moonsiff. It ought to have been taken before him, for if there is any ground for it the proper course would have been to remit it to the arbitrators that they might make a final award. Probably the objection was not taken because it suited the defendants to take the benefit of part of the award. It would not be equitable to allow them now to say that it is invalid because it does not decide all the matters in difference when they have taken the benefit of the part of it which is in their favor.

The Moonsiff then having filed the award and passed a decree, that decree is in our opinion, by the terms of Section 327, final. This has been held by five of the learned Judges of this Court, whilst I was absent, in a case which was referred to a Full Bench by myself and Mr. Justice Mitter, four of them being of opinion that an appellant might show that the paper filed

was not an award; but all agreeing that if it is an award the judgment in accordance with it is final.*

It appears to us that it was the intention of the Legislature to give to an arbitration the effect which it is generally understood it ought to have, which is mostly the object of an arbitration,—to put an end to the dispute between the parties by the decision of persons chosen by themselves. It would, in our opinion, be contrary to the object of arbitration to hold that the parties may impeach the decree which is founded upon the award by a regular appeal, and they by a special appeal to this Court, treating it in the same way as if there had been no agreement to refer to arbitration, and merely putting the award in the place of a decree of a Court of first instance. We regret that on a question of this kind, which is a very important one of practice and upon the construction of the Code of Civil Procedure, there should be any conflict between the High Courts in India. But the High Court of Bombay appears in the case in VIII. Bombay High Court Reports, A. C. J., page 17, to have come to an opposite decision to that of the Full Bench of this Court. Their decision preceded the decision of this Court by some months, but it is to be observed that they refer to only one of the previous decisions of this Court, namely, the case in XII.,

Weekly Reporter, page 50, and do not seem to have known that there were other decisions to the contrary; for instance, the judgment of Mr. Justice Phear in XIII., Weekly Reporter, 62, which was quoted to us for the appellant.

We must also remark that we doubt, and we hope that Court will forgive us for saying so, the soundness of their reasoning. They say that an order to file an award is tantamount to a decree, and is therefore appealable, distinguishing the order to file the award from the refusal to file it, which they agree is not appealable as it is not a decree. Thus they treat the filing of the award as a decree, and therefore appealable, and do not appear to us to have taken any notice of the words in Section 325, which say expressly that the judgment which is given according to the award, namely, the decree, shall be final. Section 327 appears to incorporate that, for it says that the award may be enforced as an award under the provisions of his Chapter,—that is, of Section 325, and puts, as the learned Judges of this Court have thought, the award filed under Section 327 in the same position as the award filed under Section 325. The learned Judges of the Bombay High Court say that the one is a decree just as much as the other, and yet they say that one is not final and the other is. We are unable to see the force of the reasoning upon which this decision was come

to, and we agree in the opinion in which the Judges of this Court were agreed.

The appeal must be dismissed with costs.

CALCUTTA HIGH COURT.

The 24th January, 1874.

FULL BENCH.

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble F. B. Kemp, Louis S. Jackson, F. A. Glover, and C. Pontifex, *Judges.*

JUGGESHUR DEY (*Defendant*)

Appellant,

vs.

KRITARTHA MOYEE DOSSEE (*Plaintiff*) *Respondent.*

Reference to Arbitration—Appellate Court.

An Appellate Court has no power under Act VIII. of 1859 to refer a case to arbitration, even on consent of the parties.

This case was referred to the Full Bench on the 18th September 1873 by Jackson and Glover, J. J., with the following remarks:—

GLOVER, J.—The substantial point for decision in this appeal is whether an Appellate Court has power, on the consent of the parties, to refer a case to arbitration.

In *Russool Bibee v. Shaikh Jan Ali Chowdhry*, XVII., Weekly Reporter, 31, where I was one of the Judges, it has been ruled that an Appellate Court has such power, and after full consideration I am still of the same opinion.

I was at first somewhat doubtful

as to the enunciation of the principle, chiefly on two grounds:—

First, that where an Appellate Court referred a case to arbitration, it would have first to reverse the decision of the Court below and then make the reference, in which case there would have been a "final judgment" passed in the case, which would, under Section 312 of the Procedure Code, have prevented the reference.

And secondly, that where the Lower Court's order was not formally reversed by the Judge, the result of the arbitration might be to set aside the decision of the Civil Court, a proceeding which seemed to me to be without authority.

But these difficulties are, I think, removed by the consent of the parties, and their consent to have a case tried in a particular way takes, I think, the matter out of the purview of the Act so far as procedure is concerned.

The question, however, is not without difficulty, and I am quite willing to refer it for the authoritative decision of a Full Bench.

JACKSON, J.—I think the matter should be referred for the decision of a Full Bench, as it seems very doubtful whether the provisions of the Code contemplated a reference to arbitration after decree in the Court of first instance.

The following are the judgments of the Full Bench:—

COUCH, C. J.—In this case, a suit having been brought for the re-

covery of money on adjustment of the accounts of a shop, the claim being laid at Rs. 4,500, the Subordinate Judge of East Burdwan made a decree by which he awarded to the plaintiff a certain amount, being a part of his claim, and disallowed the remainder. From this there was an appeal to the Officiating Judge. It appears that the case was referred by that Court to arbitration and an award having been made, the Officiating Judge made a decree in the terms of it. An application had been made to him to set the award aside, which was refused.

The special appeal is from this decree, and the ground taken in it is that the reference to arbitration could not legally be made.

The appeal having been heard before a Division Court, consisting of Mr. Justice Jackson and Mr. Justice Glover, that question has been referred to a Full Bench.

The power to refer suits to arbitration is contained in Section 312 of Act VIII. of 1859, and the subsequent Sections. It is under these Sections that the Lower Appellate Court has acted, having made a decree in the terms of the award as directed by Section 325.

Section 312 says:—"If the parties to a suit are desirous that the matters in difference between them shall be referred to the final decision of one or more arbitrator or arbitrators, they may apply to the Court at any time before final judgment for an order of reference."

This Section is in the part of the Act which relates to the proceedings of the original or primary Court, and the words "final judgment" here appear to me undoubtedly to mean the final judgment of that Court, the word "final" being used to distinguish the judgment from a preliminary or interlocutory one. "Final" here does not mean the final judgment in the suit, from which there can be no appeal, but the final judgment of the Court in which the suit is brought. And this Section does not itself apply to a Court of Appeal. We shall see whether there is anything in the Act, or in any subsequent Act, which will make it apply; but looking at the Section alone, it does not appear to me to do so.

Then Section 315 says that "the Court shall, by an order under its seal, refer to the arbitrator or arbitrators the matters in difference in the suit which he or they may be required to determine." The word "shall" appears to me to be imperative upon the Court. If the parties agree to refer and properly nominate arbitrators, the Court has no discretion in the matter. It is not a power which the Court may or may not exercise as it thinks fit; but the Act confers upon the parties agreeing to arbitration the right to have the reference.

Section 317 says that when the reference is made to arbitration by an order of the Court, "the Court shall issue the same processes to

the parties and witnesses whom the arbitrator or arbitrators may desire to have examined," &c. That again appears to me to be imperative upon the Court, and not a mere discretionary power which it may or may not exercise. In Section 325 provision has been made for remitting the award to the arbitrators for re-consideration, and it is provided that if no application is made to set aside the award, or if the Court shall have refused the application, the Court shall proceed to pass judgment according to the award, or according to its own opinion on the special case, if the award shall have been submitted to it in the form of a special case. That appears to me to give to the parties who have referred a suit to arbitration, when an award has been made, a right to have a judgment passed by the Court according to the award. ~~All these Sections show that it is something more than a~~ mere power in the Court to refer. It is a right to which the parties have if they think fit to exercise it.

I have said already that these Sections apply to the Court in which the suit is brought, the primary or original Court. They can only be made applicable to a Court of appeal by Section 37 of Act XXIII. of 1861, and I think that Section does not make them applicable to it. It provides that "unless when otherwise provided, the Appellate Court shall have the same powers in cases of appeal

which are vested in the Courts of original jurisdiction in respect of original suits."

This does not appear to me to be a power within the meaning of that Section. It is an enabling Clause giving to the Appellate Court various powers which may be exercised by Courts of original jurisdiction; but for the reasons I have mentioned, I think referring to arbitration does not come within the meaning of the word "power." If it were intended that the Appellate Court should be bound to refer a case which came before it to arbitration, when the parties agree to do so, the intention of the Legislature would have been more clearly expressed.

And if there were any ambiguity in the meaning of the word "power," and it were doubtful whether it might not be construed to include reference to arbitration, I think we should consider that neither reason nor convenience requires that the Appellate Court should refer a suit to arbitration in that way. It would enable the parties to it, by agreement between themselves, to refer to the decision of arbitrators chosen by themselves, the propriety (it might be on a question of law) of a decision of one of the Courts (perhaps not the High Court, as the Act does not now apply to the High Court so as to be imperative), it would enable the parties to agree to substitute, as a decree in an appeal from the decision of a

District Judge or a Subordinate Judge, the opinion of arbitrators appointed by themselves. I think this would not be either reasonable or convenient; and if there were a doubt as to the meaning of the word "power" in Section 37, I should hold that there was a good ground for not giving to it a construction which would impose upon the Court of appeal the obligation to refer a suit to arbitration.

The decision of the District Judge having proceeded entirely upon the ground that these Sections in Act VIII. of 1859 applied to the Appellate Court, and he having passed a decree under the authority given by them, I think the decree must be set aside and the suit must be remanded for rehearing. The costs will follow the result.

JACKSON, J.—I concur.

KEMP, J.—After hearing the judgment, which has just been delivered by the learned Chief Justice, any doubts I may have had upon this subject are entirely removed. The people of this country should be encouraged as much as possible to refer their differences to arbitration. That is a method of deciding disputes which is very frequently resorted to in this country, and it is one which is familiar to the people of the country and is consonant with their customs and habits, and I think it is very desirable that as little restriction as possible should be placed upon references to arbitration; but, as pointed

out by the Chief Justice, if parties are allowed to refer matters to arbitration after a case has been finally disposed of by a Court of justice, such a proceeding might tend to bring the Lower Courts into contempt.

On the whole, therefore, I concur in the judgment delivered by the Chief Justice.

GLOVER, J.—I also concur. When this reference was made, I was inclined to think that the consent of the parties got rid of the difficulty, and that a reference could be had to arbitration notwithstanding that the case had got to the Appellate stage; but after further consideration, and I may add, after hearing a fuller argument, I am doubtful as to the correctness of my first impression; at all events, I am not prepared to dissent from the judgment which has just been delivered by the Chief Justice.

PONTIFEX, J.—I entirely concur in the judgment pronounced by the learned Chief Justice.

HIGH COURT, N. W. P.

The 28th August, 1873.

FULL BENCH.

MUSSUMAT SHUMS-OOŁ-NISSA
(*Plaintiff*)

versus

MUSSUMAT ZOHRA BEEBEE and
another (*Defendants*).

*Sec. 24, Act VI. of 1871—Gift—
Mahomedan Law.*

Under Sec. 24, Act VI. of 1871, Mahomedan law is not strictly applicable to questions relating to gifts arising in suits, but the equit-

able, as between Mahomedans, to apply that law to such questions.

The following order was passed by the Divisional Bench (Pearson and Jardine, J. J.) before which the special appeal originally came on for hearing, *viz.*:—"On the hearing of this appeal it has been found necessary to determine whether, in reference to the provisions of section 24*, Act VI. of 1871, the Mahomedan law is applicable to questions regarding gift arising in suits. As we believe that the Mahomedan law has hitherto been applied to such questions (as well as in cases of pre-emption), notwithstanding the provisions of the Act above-mentioned, re-enacting the provisions of former Acts and Regulations, we think it proper to refer the point to a Full Bench."

The following opinions were delivered.

PEARSON, J.—It has been contended that gifts are included under the term "succession," and also under the words "religious usage

* Sec. 24 Act VI. of 1871—Where in any suit or proceeding it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Muhammadan law in cases where the parties are Muhammadans, and the Hindu law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished.

In cases not provided for by the former part of this section, or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience.

or institution" used in section 24 of Act VI. of 1871; and that, as among Hindoos and Mahomedans law is identified with religion, the latter words are comprehensive enough to embrace all secular dealings and transactions, so that, in short, nothing is left to be simply treated and disposed of in accordance with the principles of equity and good conscience, for which any provision can be found in the Hindoo and Mahomedan codes of law. This contention appears to me to be not maintainable, unless we set aside the ordinary sense and meaning of the words used in the law. In common parlance, a transfer by gift, sale, or mortgage is distinguished from the acquisition of property under a will, or by inheritance, or trust; and a sale of groceries, a gift of a trinket, a mortgage of a house, are not described or conceived of as religious institutions or usages. In my opinion, the Courts are not absolutely bound to apply the Hindoo or Mahomedan law strictly to questions regarding gift, or to any questions save those specifically mentioned in section 24 of Act VI. of 1871, construed in agreement with the common meaning of the terms used in it. It is urged that in practice the Courts have been used to administer Hindoo and Mahomedan law without any restriction but such as has been created by special legislation; and there is ground for believing that

some portions of that law relating to questions other than those specified in section 24 of Act VI. of 1871, which re-enacted the provisions of older Regulations of the British Government, have been frequently applied with too little consideration. Those portions may continue to have a virtual operation in as far as they coincide with and express the principles of justice, equity, and good conscience, but their application as parts of the Hindoo and Mahomedan law is not binding.

In 1813, Messrs. Colebrooke and Fombelle held that they were not bound by the latter law in a case of sale. Mr. Baillie has noticed the fact that the Courts had carried the application of that law beyond the limits prescribed by the Regulations. We cannot, however, say that any portions of that law are binding upon us, except those declared to be so, merely because other portions have sometimes been hastily and erroneously assumed (but never expressly ruled) to be applicable, without reference to justice, equity, and good conscience, although I am prepared to admit that their application, within reasonable limits, is demanded in cases of gift, and possibly in other cases not specified in section 24, by justice, equity, and good conscience, which will also take into consideration local and national customs and habits.

JARDINE, J.—I concur with Mr.

Justice Pearson. It is impossible to interpret the word "succession" in section 24 of Act VI. of 1871 so as to include gifts *inter vivos*, or to hold that the law of gift is a "religious usage or institution" in any sense different from that in which it may be said that the whole of the Hindoo and Mahomedan systems of law are religious; and it is clear from the words of the section that it was not intended to re-enact the whole of those systems of law, but only certain branches of them which are specified. Among these branches transfer and contract do not occur, though in 21 Geo. III. cap. 70, relating to the Presidency town, I find that provision is made for preserving the Hindoo and Mahomedan laws in "all matters of contract and dealing" to the followers of those religions respectively. It is no doubt true that the Mahomedan law has been often, though perhaps not quite invariably, applied to matters of gift by our Courts; but we have not been referred to any express decision that the Mahomedan law is applicable. In an old construction of Sudder Dewanny Adawlut, Lower Provinces, *Constructions*, p. 42, dated 11th December, 1813, it was held not to be applicable to cases of sale, and in *Wahidunnissa v. Shubratun* and others, VI., Bengal L. R., 56, its applicability to cases of contract was doubted.

The practice of making gifts is not peculiar to Mahomedans, and

the law of gift is no creation of theirs. I am of opinion that questions of gift, when not inseparably connected with any of the questions to which, under the Act, the Hindoo and Mahomedan laws are to be applied, must be determined by justice, equity, and good conscience." The great principles of decision should be the same for all classes of the community, though it is impossible, in respect to cases of gift, to abandon the Mahomedan law so far as it is not inequitable. I am of opinion that justice, equity, and good conscience, at all events now when the practice has been so long settled, require that we should, as between Mahomedans, observe that law of gift, as we should observe a well established local custom.

SPANKIE, J.—Section 24 of Act VI. of 1871, re-enacting the old Regulations on the point, provides that when in any suit or proceeding it is necessary for any Court under the Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Mahomedan law in cases where the parties are Mahomedans, and the Hindoo law in cases where the parties are Hindoos, shall form the rule of decision, except in so far as such law has by legislative enactment been altered or abolished. In cases not provided for by the former part of this section, or by any other law for the time being in force, the Court shall act according to justice, equity, and

good conscience. We are asked whether the Mahomedan law is applicable to questions regarding gift arising in suits. The referring Judges are of opinion that the Mahomedan law has been applied to such questions (as well as in cases of pre-emption) notwithstanding the provisions of section 24 of Act VI. of 1871.

The suit in which the question arose was one for possession and division of a house, and of a share in a landed estate. It was instituted on the part of the mother of one Salamut Beebee for a one-fourth share of properties given by deed to the said Salamut Beebee deceased, and the plaintiff claimed as one of her heirs. A material question arose whether the gift, which was not denied, was valid under the Mahomedan law. It was never pleaded in either of the Courts below that the Mahomedan law was not applicable to the case; and when it came before this Court in special appeal, there was no recorded objection to that effect in the memorandum of appeal. On the contrary, the appellant urged that the Judge's decision was opposed to Mahomedan law, while the respondents of course affirmed that it was consistent with that law. But it is understood that the appellant objected orally that section 24 of Act VI. of 1871 did not make provision for questions regarding gifts, and therefore the principles of justice, equity, and good conscience must be applied.

The respondents contend that gifts are included under the terms "succession" and "religious usage or institution;" and that as law is so mixed up with religion amongst Hindoos and Mahomedans, the words "religious usage or institution" are wide enough to apply to all secular dealings between men.

After much consideration I am of opinion that there is great force in the respondents' contention. Indeed, in the case which gave occasion for the reference, I am disposed to think that the Mahomedan law should have been strictly followed. The plaintiff sued as heir of her daughter, who, according to her allegation, had become possessed of certain property by a deed of gift, and, if the gift was valid under the Mahomedan law, she, being one of the heirs, was entitled to possession as claimed. But, however this may be, I address myself to the broader question, whether in all cases of gift the Mahomedan law must be applied. It is contended that we cannot connect "religious usage or institutions" with cases of gift, and that it would be straining the ordinary acceptance of the meaning of the words to do so. But I am not satisfied that this is the case. Usage ordinarily means use or long continued use, custom, practice. Institution means the act of establishing, establishment, that which is appointed, prescribed, or founded by

authority and intended to be permanent. One of the four senses, in which the word institution is used technically, extends to laws, rites, and ceremonies which are enjoined by authority as permanent rules of conduct or of government. So far then as the ordinary meaning of the word goes, I do not see anything anomalous in the suggestion that judicial questions regarding gifts may be determined according to religious usage, which includes prescription as well as custom. So if laws have been enjoined by authority to govern questions of gift, and were intended to be permanent, the word institution may not be misapplied. It is to be remembered that Hindoo and Mahomedan laws are so intimately connected with religion that they cannot readily be severed from it;—as long as the religious last the laws founded on them last. Mr. Baillie has noticed this, and he remarks that Mahomedans in the provinces are more in the habit of regulating their dealings with each other by their own law, and to disregard it would be inconsistent with justice, equity, and good conscience; and this being so, he assumed that the Judges have been obliged to extend the operation of the Mahomedan law beyond the cases to which it is strictly applicable under the Regulations. He quotes Macnaghten in his preface to the "Principles of Mahomedan Law"

as having arranged the order of cases in which this law has been applied by our Courts. The order is as follows:—Inheritance, sale, pre-emption, gifts, wills, marriage, dower, divorce, and parentage, guardians and minority, slavery, endowments, debts and securities, claims and judicial matters. Now, if it can be established that questions regarding the cases mentioned, excluding those specifically mentioned in the Act, are included in the terms religious usage and institutions, it is obvious that Mr. Baillie's assumption that the Judges had been obliged to extend the operation of the Mahomedan law to cases to which it is not strictly applicable under the Regulations is incorrect. Mr. Hamilton, in his preliminary discourse to the translation of the "Hedaya," observes that the judicial regulations of the Hindoos and Mahomedans are in fact so intimately blended with their religion, that any attempts to change the former would be felt by them as a violation of the latter. He further suggests that, should the British Legislature ever wish to introduce an uniform system of jurisprudence amongst them, it will at the same time dictate the necessity of preserving sacred and unaffected the infinite number of usages essential to the ease and happiness of a people, differing from us as widely in customs, manners, and habits of thinking, as in climate, complexion, and

language. The same author has also observed that "the Mahomedan law proceeds, in its determinations, upon two grounds;—the text of the 'Koran' and the 'Sonna' or oral law.

The Koran is considered by the Mussulmans as the basis of their law, and is therefore, when applied to judicial matters, entitled, by way of distinction, 'Alsbarra' or 'The Law.'

The "Sonna," he declares, stands next in authority to the 'Koran,' being considered a supplement to that book, and the word "Sonna," he says, signifies custom, regulation, or institute. The Arabic word is said to mean literally a religious ceremony necessary to be performed. It means in the traditions of Mahomed an ordinance, institute, rite, any institute or ceremony mentioned in the traditions.

The "Sunnut" or "Sonna" forms the body of what is termed the oral law, and it applies to many points of both a spiritual and temporal nature not mentioned, or but slightly touched upon in the Koran. This is Mr. Hamilton's construction of Sonna, and a learned author of our own times, and one of our most experienced Mufussil Judges, Syed Ahmed Khan Bahadoor, fully confirms this view. He says that "the old writers upon Mahomedan law considered the 'Koran,' the truth of which was universally admitted, as the best and important source

whence to derive the principles of our law. Next to the 'Koran' they ranked as authority such of the sayings of the Prophet the authenticity of which had been satisfactorily proved; and, lastly, those of the Prophet's surviving associates." (Essay on the Mahomedan Theological Literature, page 14.)

These sayings are the "Sunnut," or "Sonna," the "Hadeeses," and they govern the conduct of men, and their actions and dealings. The 'Koran' treats of the following questions which ordinarily come before our Courts,—marriage, dower, divorce, guardianship, minority, parentage, legal disabilities. I do not refer to crimes of course, or to numerous other subjects dealt with in the Koran, which ordinarily have no connection with our Civil Courts. The oral law therefore provides for cases not clearly referred to in the Koran, such as those of gift, pre-emption, and others stated by Sir William Macnaghten to have been determined under the Mahomedan law by our Courts. It is worthy of notice that some commentators are said to rely upon a particular passage in the Koran as applying to gifts, but there being a doubt upon that point, it cannot be regarded as established.

Questions then of gifts, pre-emption, &c., if not governed by Mahomedan law, as expressed clearly in the text of the Koran, are controlled by religious usages, founded on,

or institutions enjoined by the oral law, or sayings of the Prophets. There is also another point of view from which we may look at this question. It is possible that the direction of the old Regulations, and of section 24 of Act VI. of 1871, that in certain cases not provided for by the first part of the section, the Courts are to follow the principles of justice, equity, and good conscience, may mean that these principles are to be applied to the Mahomedan law in cases between Mahomedans not specifically provided for in the section, and to the Hindoo law as between Hindoos. There would be some consistency in this view, and the preservation of the laws of these religious communities would not be lost sight of altogether. It may be that the Judges of our Courts regarded the law in this sense; and the fact that they did so, whether they believed that the words religious usage and institutions covered the cases or not, would account for the all but invariable practice of administering the Mahomedan law strictly.

I now proceed to notice this practice. The Presidency Court of the Sudder Dewanny Adawlut, from the beginning of its existence to the date of its dissolution, has followed the provisions of the Mahomedan law in cases of the nature referred to us. The earliest notice of such cases is in 1702, and I cannot find that the practice was

ever altered. It is true, as noted by Mr. Justice Pearson, that the Judges in 1813 held that they were not bound by the Mahomedan law in cases of sale. It has also been observed by Mr. Justice Jardine that in the Presidency towns provision was made by 21 Geo. III., cap. 70, for preserving the Hindoo and Mahomedan laws in all matters of contract and dealing, to the followers of those religions respectively. The High Court has not, to my knowledge (and I have searched the reports,) introduced any change in practice in dealing with cases of gift and the like. Mr. Justice Jardine has referred to a case, one of dower, reported in VI. Beng. L. R., 54, in which Mr. Justice Hobhouse considered the claim was one of contract, and that the Mahomedan law was inapplicable to it; but the Mahomedan law was applied, and not the principles of justice, equity, and good conscience. Mr. Justice Loch, who also tried the case with Mr. Justice Hobhouse, did not apparently share his doubts. The practice of the Sudder Dewanny Adawlut, North-Western Provinces, as far as I can ascertain it from printed reports, has been similar to that of the Calcutta Sudder Dewanny Adawlut. In February, 1866, it applied the Mahomedan law so strictly in a case of gift as to hold, where the donor and donee were a Soonnee and Sheah, that the principles of the law must be followed, and not

those laid down in Regulation VIII. of 1832. Since the establishment of our High Court, where the parties are Mahomedans, and a claim is based upon their law, it has always been followed. It was admitted in argument that up to date the Judicial Committee of the Privy Council has not suggested any doubt as to the correctness of the all but universal practice of our Courts from the earliest times. No case other than that referred to by Mr. Justice Jardine was brought to our notice as having been disposed of in any Court of the Presidency of Bengal, including the North-Western Provinces, or of Bombay or Madras, which took the appellant's view of the question.

Coming, therefore, to the conclusion that the Courts have invariably followed the Mahomedan law in cases of gift, pre-emption, and the like, when the parties were Mahomedans and the claim founded on Mahomedan law, and believing that in doing so they were within the law of the old Regulations and of section 24 of Act VI. of 1871, I am of opinion that the proper answer to the reference is that the suit giving rise to it should be determined by that law, and without reference to the principles of justice, equity, and good conscience.

STUART, C. J.—This is a reference to the Full Bench of the Court by a Divisional Bench (Pearson and Jardine, JJ.) in Special Appeal No.

161 of 1873, in these terms :—
 “On the hearing of this appeal it has been found necessary to determine whether, in reference to the provisions of section 24 of Act VI. of 1871, the Mahomedan law is applicable to questions regarding gift arising in suits. As we believe that the Mahomedan law has hitherto been applied to such questions (as well as in cases of pre-emption,) notwithstanding the provisions of the Act above-mentioned re-enacting the provisions of former Acts and Regulations, we think it proper to refer the point to a Full Bench.”

Having had the advantage of perusing and considering the judgments of the other members of the Court, I have formed the opinion and arrived at the conclusion which I now desire to explain. We are indebted to Mr. Justice Spankie for the learning and research he has brought to bear on the case. It is remarkable, as he points out, how intimately blended together are religion and law in the Mahomedan system; and from the authorities he quotes it would really appear that the principle of interpretation he lays down, at least does no violence to undoubted Mahomedan doctrine. His opinion, however, that the law of gifts as applied to the suit before us, however otherwise well supported, is open to the remark of Mr. Justice Pearson, that it leaves “nothing to be simply treated and disposed of

in accordance with the principles of justice, equity, and good conscience for which any provision can be found in the Hindoo and Mahomedan codes of law;” and I think it impossible to read the Act without perceiving that such could not have been the intention of those who originally framed it. Whatever may be the traditional feelings of Mahomedans respecting the application of their religious principles to their worldly condition, to their manners and customs, personal, domestic, and social, and in short to every act of their lives, it cannot, I think, be maintained that we are to read this 24th section of Act VI. of 1871 as dealing with any questions other than those which are matters of law strictly so called. Had such not been the intention of the Act, it would surely have been provided that in construing it the Courts were to have regard to the religion of Hindoos and Mahomedans, but, on the contrary, “religious usage or institution” itself is included among the subjects mentioned in the first part of the section, and distinctly and separately from the others. It is clear, therefore, that in the mind of the Legislature that enacted this law the religious usage and institutions of Mahomedans or Hindoos stood by themselves, and as such quite distinct from other, or, as they may be called, non-religious branches of their law—that is, branches of their law not so peculiarly and distinctly religious as

the usages and institutions mentioned in the Act. Of course whatever can be correctly said to fall under the expression "religious usage or institution," other than that which is plainly so, is also included in the rule of decision provided by the first part of section 24; and the contention on behalf of the respondents is that the gift in suit before us must be regarded in that position. I am of opinion, however, that the gift in question was no more "religious" in the sense of the section than any other act, matter, or thing relating to the ordinary life or conduct of Mahomedans. It was, however, suggested that, if gifts are not to be considered under the head of religious usages or institutions in the sense of this section, they might perhaps be classed under "succession," which is one of the subjects enumerated in the first part of the section, and so far as that term means one person coming in the place of another in regard to property, the donee in this case for example, coming in place of the donor, the term would appear not to be misapplied, that is, where the property is land or other immovable subject. It would, of course, be different where the property was merely personal or movable, such as trinkets or other matters referred to by Mr. Justice Pearson, and as to which the word succession would clearly be inappropriate. Mr. Justice Jardine supplies the right answer

to such a suggestion when he points out that the word succession cannot be understood to include gifts *inter vivos*. But while the argument maintained in Mr. Justice Spankie's judgment appears to me, for the purpose of the suit, to carry the connection or relation between the religion of Mahomedans and their laws too far, and while I hold the opinion that such a gift, as is the subject of the suit before us cannot be classed either under "religious usage or institution," or under "succession," I think we must give the words justice, equity, and good conscience a definite and limited meaning and application, and understand by them the kind of justice, equity, and good conscience that is supposed to exist in the breast of the Court or Judge, and by the application of which it is the duty of the Court or Judge to expound or modify particular laws. The view I incline to take of section 24 is this,—that where it provides that where in any suit or proceeding there arises any question regarding "succession, inheritance, marriage, or caste, or any religious usage or institution, the Mahomedan and Hindoo law shall form the rule of decision," it means that such law shall, in the cases mentioned, be strictly and exclusively applied, but in regard to all other cases Hindoos and Mahomedans shall not be deprived of their own law, but that such law shall be applied rather in the spirit than in the letter, and

according to "justice, equity, and good conscience." This part of the section, indeed, contrasts remarkably in its language with the first part. It does not contradict the first part. It does not say that in all other cases the Hindoo or Mahomedan law shall *not* form the rule of decision, but merely in regard to other cases, "the Court shall act according to justice, equity, and good conscience." It can hardly be maintained that it was intended by this entirely to abrogate the Hindoo and Mahomedan law in the cases contemplated by it. There is, for example, a large and definite body of Mahomedan law relating to gifts, which has for a long period been consistently applied by the Indian Courts, and it surely was not intended to abrogate that. The intention may even have been the very opposite of this, *viz.*, not only not to abrogate such portion of the Hindoo or Mahomedan law, but on the contrary to administer them, and so to administer them that in doing so the Court shall act according to justice, equity, and good conscience, in other words, that in no cases and under no circumstances shall Hindoos or Mahomedans be deprived of the benefit of their own laws, but that in regard to some of them the strict letter shall be applied, whereas in regard to others the principles and spirit of the Hindoo or Mahomedan law shall be considered by the Court, and according to the prin-

ciples of justice, equity, and good conscience..

My answer to this reference therefore is that in my judgment the gifts mentioned in this reference do not fall under religious usages or institutions, or under the term "succession" mentioned in the first part of section 24; but that whatever may be the true interpretation of that section in respect to other branches of law, justice, equity, and good conscience themselves require that the Mahomedan law should be equitably applied at least to cases of gift, a conclusion in which it appears Mr. Justice Pearson and Mr. Justice Jardine concur. I have of course considered the case solely with reference to questions between Hindoos and Mahomedans themselves. Where Hindoos or Mahomedans have disputes or dealings with Europeans, another and very different element of interpretation would be introduced, unless the matter happened to be limited by special contract.

The case, on 28th August, was returned to the Divisional Bench. The judgment of the Court was delivered by

PEARSON, J.—Adverting to the opinion of the majority of the Judges by whom the question referred to the Full Bench was considered, we think it equitable to apply the Mahomedan law to this case. The lower Courts have found that the gift was not valid by that law, inasmuch as immediate and complete

possession of the property, the subject of the gift, was not made over by the donor to the donee. We must accept the facts found, and on those facts the ruling of the lower Courts is not shown to be erroneous in law. Accordingly we dismiss the appeal with costs.

CALCUTTA HIGH COURT.

The 24th February, 1874.

The Hon'ble F. B. Kemp, *Judge.*

MUDDUN RAM DOSS (*one of the Plaintiffs*) *Appellant,*

vs.

ISRAEL ALI CHOWDHRY and another
(*Defendants*) *Respondents.*

Withdrawal of Suit for failure to produce evidence.

A plaintiff cannot be permitted to withdraw with liberty to bring a fresh suit, after issues have been joined and he has failed to produce evidence to support his claim.

There is only one ground of special appeal in this case, and that is that the Lower Courts were wrong in not permitting the appellant to withdraw with permission to bring a fresh suit, inasmuch as they did not inquire whether the grounds upon which the special appellant prayed to be permitted to bring a fresh suit were sufficient or not. It appears in this case that the plaintiff had on a previous occasion withdrawn his suit with permission to bring a fresh suit, and

the present suit was brought on the 10th of May 1872. The written statement of the defendant was filed on the 5th of June 1872, in which the plaintiff's title and possession are clearly traversed. Subsequently, the defendant applied stating that his documents had been filed in the first suit which was withdrawn by the plaintiff, and he asked to be permitted in the present suit to file another document, and this was done. Immediately after that, or considerably more than one year, or one and half year after the plaint was filed, and when the witnesses were going against the plaintiff's claim, the plaintiff again applies to be permitted to withdraw with liberty to bring a fresh suit. I think the Courts below were quite right in not allowing any such privilege. There is a decision to be found in Volume XII., Weekly Reporter, Privy Council Rulings, page 44, in which their Lordships hold that in those cases in which the suit fails by reason of some point of form the parties may be allowed to withdraw the suit with liberty to bring a fresh suit, but not in a case like this in which issues were joined and the plaintiff failed to produce evidence in support of his claim.

The special appeal is dismissed with costs.

CALCUTTA HIGH COURT.

*The 28th May, 1874.*Before Sir R. Couch, Kt., Chief
Justice, and C. Pontifex, J.CHUNDER CAUNT MOOKERJEE
(*Defendant*) *Appellant*,
*versus*RAM COOMAR COONDOO and another
(*Plaintiffs*) *Respondents*.*Maintenance—Suit for damages
against the party carrying liti-
gation in the name of another.*

An action may be maintained against a person for maliciously, and without reasonable or probable cause, procuring a suit to be instituted. The fact that two of the Judges of the High Court were of opinion that the plaintiffs were entitled to a decree (which was subsequently reversed by the Privy Council) would show that there was reasonable and probable cause for the plaintiffs prosecuting the suit. If there be no reasonable or probable cause for bringing a suit, the want of it would be evidence of malice.

It has always been admitted that the English Common Law, and the Statutes as to maintenance and champerty, are not applicable, and are considered as having no force in this country. They certainly do not apply in the Mofussil, whatever question there might be how far they had been introduced within the jurisdiction of the Supreme Court. The ground upon which agreements which are champertous, or agreements for maintenance, have been held to be void in this country, is, that they are contrary to public policy, or, as described by the Judicial Committee of the Privy Council in *Fischer vs. Kamala Naicker* (8th Nov., 1. A., 170) are considered to be immoral and against public policy, and such as the law will, therefore, not enforce here, and will treat as void.

But if this is the ground on which agreements of this kind are void in India, as I consider it to be, according to the decisions on the subject in India, and also by the Judicial Committee, it will not enable an action to be brought against the person who maintains the suit. The ground on which an action is allowed in England, *viz.*, that the defendant has been guilty of an offence by which the plaintiff has suffered damage, does not exist here. When we examine the English law and see the grounds of the action there, I think that in this country an action for maintenance cannot be brought.

The decision in Vol. II., *Legal Companion*, p. 57, reversed.

COUCH, C. J.—The plaint in this suit stated that the defendant conspired and agreed with certain persons, named John McQueen and Mary Anne (his wife), to cause or suffer to be instituted and maintained in their names a civil suit for the possession of certain lands and premises of which the plaintiffs were in possession as owners, and it set out a deed made between McQueen and his wife and the defendant, in which, after reciting the title of McQueen and his wife to the premises of which the plaintiffs were in possession, it is recited that McQueen and his wife had applied to the defendant to assist them in commencing and conducting such proceedings as might be necessary for the recovery of the said premises, "and to pay all advances, and disburse all and every sum or sums of money whatever, which should or might be necessary for stamps, fees to counsel,

or mooktears' fees, or for any purpose whatever referring to the said proceedings." It is also recited that the two persons requiring assistance, the defendant had agreed to pay to them the sum of Rs. 150 a month for their support and maintenance until the final determination of the suit and proceedings. It was then covenanted on the part of the defendant to provide the money to carry on the suit and to pay Rs. 150 monthly, and it was agreed between McQueen and his wife and the defendant that the defendant was, in the first place, out of the monies to be recovered from the defendants in that suit, or in case of recovering the lands held by them, out of the proceeds of the sale thereof, to retain and reimburse himself all monies he might have paid, advanced, or disbursed under the agreement, either in respect of the suits so to be commenced or otherwise, with interest at the rate of 12 per cent. per annum, or in respect of the monthly sum of Rs. 150, and then to retain by way of remuneration for his trouble and risk in conducting and carrying on the business and advancing the necessary funds therefor, and for the monthly payments, one equal third part or share in the clear net proceeds of such suit or suits after all payments with interest.

The plaint states the proceedings in the suit, and charges that the defendant, by reason of the acts

which he is alleged to have done, had made himself liable for all costs incurred by the plaintiffs in defending the suit, and for the rents and profits which the plaintiffs would have received in respect of the property since possession of it was obtained by McQueen and his wife under the decree of the Court.

Mr. Justice Macpherson made a decree in favour of the plaintiffs, from which this is an appeal. What we have to determine is whether, on the facts proved, the action or suit can be maintained. Now, an action may be maintained against a person for maliciously, and without reasonable or probable cause, procuring a suit to be instituted. The law on this subject is stated by Mr. Justice Williams in a case to which I shall presently refer. The action may be brought against the defendant, although he was not a party to the suit, because an action would be maintainable against the plaintiffs in the suit if they instituted it without reasonable or probable cause. Practically, such actions are seldom or never brought, because if the suit has been brought without reasonable or probable cause, the judgment will be in favour of the defendant, and he will get his costs by the judgment in the suit. Consequently, actions for instituting proceedings without reasonable or probable cause are mostly where the proceedings were of a criminal nature, as in an action for malicious prosecution ; or

where the proceeding is one in which the defendant has been arrested, then the action is for the malicious arrest. But in order to maintain an action of this kind there must be malice, and the suit must have been brought without reasonable or probable cause. Mr. Justice Williams, in *Cotterell vs. Jones* (11, C. B., 730), says: "It is clear that no action will lie for improperly putting the process of the law in motion in the name of a third person, unless it is alleged and proved to have been done maliciously and without reasonable or probable cause; but, if there be malice and want of reasonable or probable cause, no doubt the action will lie, provided there be also a legal damage."

In this case Mr. Justice Macpherson has found, and I agree with him, that there could not be said to be a want of reasonable or probable cause for instituting the suit. A division bench of this Court made a decree in favour of the plaintiffs. It is true that the decree was reversed on appeal to Her Majesty in Council, but the fact that two of the learned Judges of this Court were of opinion that the plaintiffs were entitled to a decree would show that there was reasonable and probable cause for the plaintiffs prosecuting the suit and attempting to recover possession of the property. We must take it, on the authority of the highest tribunal, that the learned Judges

of this Court were mistaken in the view which they took of the plaintiffs' case; but we cannot say that persons who have obtained a judgment of the High Court, although it was afterwards reversed, had not reasonable or probable cause for bringing the suit. If there had been no reasonable or probable cause for bringing the suit, the want of it would have been evidence of malice. But that is not the case here. And there is no evidence that the defendant entered into this agreement with McQueen and his wife from any malicious motive. In fact, all the evidence we have as to how the agreement came to be made is the recital in the deed. That shows that these persons, thinking they had some right to recover possession of the property, and being without means to institute proceedings for that purpose, applied to the defendant to lend them the means of remaining within the jurisdiction of the Court and to support them while the suit was proceeding. So far as there is any evidence in the case, I think there is no ground for holding that an action for malicious prosecution, and without reasonable or probable cause, can be maintained against the defendant.

I may, in addition to *Cotterell vs. Jones*, upon the law for this part of the case, also refer to *Flight vs. Leman* (4, Q. B., 883).

The case has been presented in the plaint in another form, *viz.*,

as an action for what is called maintenance, for maintaining a suit which was brought by McQueen and his wife. Now, we have to see whether such an action can be maintained in India. When we look at the ground upon which it is maintainable in England, it will be seen that the cases where it has been allowed will not apply in this country, and cannot be considered as being the law here. In England maintenance and champerty were offences by the Common Law, punishable according to the Common Law. This is shown in Hawkins' Pleas of the Crown, where he treats of this subject. The statutes in England were declaratory of the Common Law, and imposed penalties for these offences in addition to the penalties which were imposed by the Common Law. So that the state of things in England is that maintenance was an offence, and punishable as such, and an agreement in England to maintain an action, or an agreement of a champertous nature, was void, because it was to do that which was illegal; it was an agreement to do what was an offence, and so it was void. The reason that a person who suffered injury by an action being maintained by another was allowed to bring a suit, was that if a person did an illegal act by which another suffered special damage, an action might be brought against him for the damage. An illustration of this is

to be found in an action being allowed to be brought against a person guilty of the offence of obstructing a public highway, by a person who suffered special damage by reason of the highway being obstructed. On the same principle, an action for maintenance was allowed in England; but that does not apply to India. It has been always admitted that the English Common Law, and the statutes as to maintenance and champerty, are not applicable, and are considered as having no force in this country. They certainly do not apply in the Mofussil, whatever question there might be how far they had been introduced within the jurisdiction of the Supreme Court. The ground upon which agreements which are champertous, or agreements for maintenance, have been held to be void in this country, is, that they are contrary to public policy, or, as described by the Judicial Committee of the Privy Council in *Fischer vs. Kamala Naicher* (8th Nov., I. A., 170) are considered to be immoral and against public policy, and such as the law will, therefore, not enforce here, and will treat as void. But if this is the ground on which agreements of this kind are void in India, as I consider it to be, according to the decisions on the subject in India, and also by the Judicial Committee, it will not enable an action to be brought against the person who maintains the suit. The ground

on which an action is allowed in England, *viz.*, that the defendant has been guilty of an offence by which the plaintiff has suffered damage, does not exist here. When we examine the English law and see the grounds of the action there, I think that in this country an action for maintenance cannot be brought. This part of the case of the plaintiffs in this suit is, therefore, unsupported.

But the case was also put on another ground. It is said that the defendant had an interest in the suit, which was brought by McQueen and his wife, and having an interest in the suit, and having also (as it is not disputed he did) supplied the means of carrying it on, he ought to be made liable to pay the costs by an action being brought against him. This argument assumes that the agreement in the indenture is a valid one, and that it is not void as being contrary to public policy, for if it were, the defendant acquire no interest in the property. Taking it that the defendant did acquire an interest in the subject matter of the suit by the agreement, and that it was carried on for his benefit, as well as for that of the plaintiffs in it, the objection against the present suit is that the defendant was not guilty of any wrongful act. If he had an interest in recovering the property, it was not a wrongful act to supply the money to carry on the suit. For this reason it

was in England, an answer to a suit for maintenance that the party had an interest in the suit which was brought, and which he was charged with having maintained. In considering the third ground on which it is sought to support the case of the plaintiffs, we must take it that the defendant did not do a wrongful act, and, therefore, there is no ground for the plaintiffs being allowed to bring an action against the defendant, although they may have sustained an injury by the defendant supplying the means for carrying on the suit. If the act is one which the defendant might lawfully do, the plaintiffs cannot sue him for damages which they have sustained by reason of it. The course which ought to have been taken, assuming, as we must in this part of the case, that the agreement was not void, and that the defendant had an interest, was to make the defendant a party to the suit, that he who had become entitled to one-third part of the proceeds of the suit should, by becoming a party to it with the other plaintiffs, put it in the power of the Court to give judgment against him, and to bind him by the judgment as others would be bound, and, if necessary, to make an order that he should pay the costs. It was known to the plaintiffs that this deed had been made, but whether it was known or not, and if they did not discover it before the suit was final-

ly disposed of, which would be their misfortune, they are not in a worse position than where persons may be made liable in a suit as defendants, but the plaintiff, not being aware of their liability, does not join them in the suit; the plaintiff cannot afterwards sue them. Here the plaintiffs might have insisted that the defendant should be made a party to the suit. And if it was doubtful whether that could be done, there are various authorities to show that if the suit was really his suit, and was carried on for his benefit, the defendant might have been required to give security for the costs. Mr. Kennedy has cited several cases on the point which were decided by the Courts in Ireland, and there are cases in the English Courts to the same effect. If a person who has an interest in having a question decided puts forward another to have it tried in a suit in his name, but the person putting the nominal plaintiff forward is the substantial plaintiff in the case (as where a landlord puts forward his tenant to dispute a claim of right of way), the

Court has power to, and would require the real plaintiff, although not appearing as such, to give security for the costs. *

It appears to me that, in this case, either the defendant ought to have been required to be a plaintiff with McQueen and his wife, or that he ought to have been called upon to give security for costs. The Court having erroneously refused to do that, there ought to have been an appeal. The plaintiffs have omitted to take the course which the law prescribed, and they cannot remedy it by bringing an action when there is no principle of law on which it can be maintained.

I think the suit should be dismissed; but looking at all the circumstances of the case, it is not one in which the defendant should get his costs. The decree of Mr. Justice Macpherson will be reversed, and the suit will be dismissed without costs in either Court.

PONTIFEX, J.—I also think this suit must be dismissed.

tion, it is unnecessary for me to determine whether or not the trial was held by the Court having jurisdiction in the district in which the offence was committed.

It is urged in the grounds for revision that the offence has not been committed, because there is no proof that the complainant actually suffered directly or indirectly from the scandalous imputation made on him by the accused. It is not necessary to prove any such result in order to sustain a charge of defamation; it is sufficient to show that the accused intended or knew or had reason to believe that the imputation made by him would harm the reputation of the complainant, and of this intention or knowledge the nature of the imputation made by the accused in this case affords ample presumption.

It is also urged in the grounds of revision that although the accused named 12 witnesses in his defence, only four were examined. From the record I find the accused, when called on to make his defence and adduce his evidence, named four witnesses only, and these were duly examined. There is nothing to show that he then requested that other witnesses should be examined, or that the Magistrate prevented him from calling other witnesses. The grounds then on which revision is sought, in my judgment fail, and the application must be dismissed.

CALCUTTA HIGH COURT.

The 30th March, 1874.

FULL BENCH.

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, J. B. Phear, E. G. Birch, and G. G. Morris, *Judges*.

NRIGENDRO LALL CHATTERJEE,

Petitioner,

vs.

OKHOY COOMAR SHAW and others,
Opposite Party.

*Partner—Criminal Misappropriation—Act XLV. of 1860, S. 405.**

A partner who dishonestly misappropriates or converts to his own use, or dishonestly uses or disposes of any of the partnership property which he is entrusted with or has dominion over, is guilty of criminal misappropriation under S. 405 of the Penal Code.

Couch, C. J. and Ainslie, J., differing from the decision in 9, W. R., C. R., 37, referred the following question for decision by a Full Bench:—

Whether, if a partner dishonestly misappropriates or converts to his own use, or dishonestly uses or disposes of any of the partner-

* Sec. 405, Penal Code.—Whoever, being in any manner entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property, in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."

ship property which he is entrusted with, or has dominion over, he is guilty of an offence punishable under the Penal Code.

The judgment of the Full Bench was delivered as follows by—

COUCH, C. J.—In this case a charge was preferred by the applicant against Okhoy Coomar Shaw and others before the Magistrate of an offence of criminal misappropriation. The Magistrate dismissed the complaint and discharged the defendants, on the ground that the complainant and the accused were partners, or, as he says in the first part of his judgment, that they were, according to a deed of partnership, joint owners of the property in respect of which the criminal misappropriation was alleged. He founded his decision upon a case in this Court in the *IX.*, Weekly Reporter, Criminal Rulings, p. 97, in which two of the learned Judges, Mr. Justice Kemp and the late Mr. Justice Mitter, held that if there was a partnership there could not be a conviction for criminal breach of trust. Mr. Justice Elphinstone Jackson appears to have doubted this, and not to have concurred with the other two Judges. He took a different view of the case, and also said that he was inclined to think that there might be circumstances under which one partner might be guilty of criminal breach of trust against another.

An application was made to this Court before myself and Mr. Justice Ainslie, under section 297 of the Criminal Procedure Code, to send for the papers and to decide upon the validity, in point of law, of the Magistrate's decision.

Seeing that the Magistrate had acted upon a decision of this Court, we felt bound to refer the question for decision by a Full Bench, although I think I may say that we neither of us at the time entertained any serious doubt upon it.

It appears that there is a decision of Mr. Justice Markby and Mr. Justice Birch in *XXI.*, Weekly Reporter, Criminal Rulings, p. 10, in which those learned Judges have held that there may be an offence under Section 424 of the Penal Code, there may be a fraudulent concealment or removal of property, whether the fraud is intended to be practised on creditors or partners. This case was not quoted when the application was made to us; but if it had been, we should still have been under the necessity of referring the question to a Full Bench.

We think the words of Section 405 of the Penal Code are large enough to include the case of a partner, if it be proved that he was in fact entrusted with the partnership property, or with a dominion over it, and has dishonestly misappropriated it, or converted it to his own use. There is no reason that the case of a partner should be excepted from the operation of this

Section. Indeed there is every reason that it should be included in it. It is a question of fact whether there has been an entrusting of the property, or a giving a dominion over it, sufficient to come within what is required. But if it be made out by the evidence that one partner was entrusted by his co-partners with property, or with a dominion over it, and that he had dishonestly misappropriated it, or dishonestly used it in violation of the mode in which his trust was to be discharged, or of the agreement between the parties as to the use he was to make of the property, he ought to be tried for that offence. I therefore think we should say that the decision in the IX., Weekly Reporter cannot be supported, and that the Magistrate ought to enquire into the charge and determine whether, upon the evidence which may be produced before him, there is sufficient ground for putting the accused upon their trial. I do not think that we can make an order of that kind in the Full Bench. The matter will therefore stand over until Mr. Justice Ainslie returns.

CALCUTTA HIGH COURT.

The 11th April, 1874.

FULL BENCH.

The Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble P. B. Kemp, L. S. Jackson, J. B. Phear, W. Markby, F. A. Glover, W. Ainslie, C. Pontifex, E. G. Birch, and G. G. Morris, *Judges*.

THE QUEEN

versus

MAHOMED HUMAYOON SHAH,

Appellant.

Alternative Charge—False Evidence
—Act XLV. of 1860 Sec. 193.

Held by the majority (Jackson, J., dissenting) that a charge framed on the model given in Sch. III. of the Code of Criminal Procedure charging the accused upon two charges with having made contradictory statements in the course of judicial proceedings under Section 183, Penal Code, is a good charge, and that (Phear and Jackson, JJ., dissenting) the Court or Jury, if convicting, need not by direct evidence find which of the two statements is false;—all that is necessary being that the Court or Jury should find that the allegations made in the charge are proved.

This case was referred to a Full Bench by Jackson and Mitter, JJ., on the 17th September 1873, with the following remarks:—

JACKSON, J.—The question raised in the present case is whether the conviction of the prisoner is valid. The offence of which the prisoner is convicted is stated in these words:—"That he did, on or about the 23rd day of January 1873, at Alipore, in the course of the trial

of Toolsee Dass Dutt and Mahomed Luteef, on a charge of cheating, state in evidence before Moulvie Abdool Luteef, Deputy Magistrate at Alipore, that 'the greater part of the furnitures were sent by me to that house (*viz.*, the house at Chitpore), and a small portion by Belilios and Zuhoorooddeen;' and that he did, on or about the 13th day of February 1873, at Alipore, in the course of the trial of J. R. Belilios, Toolsee Dass Dutt, and Mahomed Luteef, in the same case of cheating, state in evidence before Moulvie Abdool Luteef, Deputy Magistrate at Alipore, that 'Belilios never sent any furniture of his own, or of any one else, to that house (*viz.*, the house at Chitpore), nor was any of the furnitures in that house belonging to Belilios;' and it is said that one of these two contradictory statements the prisoner "either knew or believed to be false, or did not believe to be true, and that he has thereby committed an offence punishable under Section 193 of the Indian Penal Code." It is not found that one or the other of these statements is in fact false, or that either of such statements if false was intentionally given; but the conviction manifestly rests upon the simple circumstance that the two statements are contradictory one of the other. It has been contended that neither Section 193 or Section 72 of the Indian Penal Code, nor any provision of the Criminal Procedure Code of 1872, justifies such conviction. There is a Ruling of the Full Bench in 6, W. R., Criminal Rulings, p. 65, which supports the conviction, but the authority of that decision has been questioned in several later cases, *viz.*, the case of Queen v. Mati Khowa in 3, B. L. R., Cr. App. Juris., p. 38;* the case of Queen v. Nomal in 4, B. L. R., Criminal Ruling, p. 9;† in 9, W. R., pp. 25 and 54. and in 12, W. R., p. 11. For myself I feel bound to say that I always entertained the contrary opinion. I expressed that opinion on the occasion of a case coming before the English Committee of this Court in 1862, the papers of which case are appended to this record. It may be suggested that this reference is not necessary, inasmuch as the decision of the Full Bench is partly based on the terms of Section 381 of the old Code of Criminal Procedure, which is no longer in force; but I think it cannot be denied that if the reasoning of Sir Barnes Peacock in that case is carried to its full extent, it will also hold good under the new Code of Criminal Procedure. It is also pointed out that Schedule 3 annexed to the Procedure Code contains the form of an alternative charge under Section 193, and from this it may be supposed that the intention of the Legislature was to make a convic-

* 12, W. R., Cr., 31.

† 12, W. R., Cr., 69.

tion in that form perfectly good. As at present advised, I think this is not so ; and on all considerations I think this matter should be referred to a Full Bench for an authoritative ruling.

MITCHELL, J.—I agree in the order of reference. I do not wish, however, to express any opinion upon the point in question.

The judgments of the Full Bench were delivered as follows :—

MORRIS, J.—I think it sufficient to say upon this reference that, in my opinion, the conviction arrived at by the Jury upon two charges framed in the alternative form, according to the model given in Schedule 3 of the Criminal Procedure Code, is good in law. It seems to me that the two statements embodied in each charge, which were made by this prisoner, must be taken together, and that when so taken together they comprehend the specific offence of intentionally giving false evidence in a stage of a judicial proceeding. It is possible that each of the statements, and not one of them merely, was in itself false, and that taken singly each might have afforded good ground for a distinct charge of an offence under Section 193 of the Penal Code ; but this course was not followed. The simpler course allowed by the law was adopted of framing a charge containing two contradictory statements of such a nature that the two, *when taken in combination*, disclosed the specific

offence of intentionally giving false evidence. It must be matter of evidence whether the contradictory statements contained in the charge are *per se* so irreconcilable that one of them is necessarily false, and also that the prisoner, in making them intentionally, spoke falsely in regard to one of them. This it is the province of the Jury or Court to determine, and in the present instance the Jury had no difficulty in arriving at such a determination. It seems clear that the new Code of Criminal Procedure has expressly contemplated and, indeed, provided for this result. When Section 442 provides that the charge may be in the form given in the 3rd Schedule, and when the 3rd Schedule gives an alternative form of charge in these words “ that you, on or about (such a date and place), in the course of the enquiry into (such a matter), and before (such an officer), stated in evidence (such and such words), and that you, on or about (such another date and place), in the course of the trial of (so and so), before (such an officer) stated in evidence (such and such other words), one of which statements you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under Section 193 of the Indian Penal Code,” I cannot but hold that if those statements are radically contradictory one of the other, so that the contradiction

involves of necessity a falsehood, and it be proved that the deponent uttered them, and that he by so doing deliberately intended to speak falsely, the substantive offence of intentionally giving false evidence in a stage of a judicial proceeding is thereby established, and no need exists to determine by distinct evidence which one of the two statements is absolutely false. No doubt, strictly speaking, this form of charge is not an alternative charge in the sense contemplated by Section 45, Criminal Procedure Code. This is not a case where two or more offences are disclosed by the single act or set of acts committed, or rather alleged to have been committed, by the accused, and it is doubtful what particular offence in law can be found on the facts proved; but the alternative consists in this that of two statements made by the accused, one or other of them, it does not matter which, inasmuch as the two involve an absolute contradiction, must be of such a nature that the person making it either knew or believed it to be false, or did not believe it to be true. It is, as already said, expressly to meet this particular kind of offence that Schedule 3 contains a specific form described as a form for "alternative charges on Section 193" of the Indian Penal Code. If it were intended that the Jury or Court should find which of the two statements set out in the charge was false, not only would this form be

cumbrous and unmeaning as an alternative form, but the force of the two contradictory statements in combination would be entirely lost, so as to enable such Jury or Court to determine that the accused knew or believed one of the statements to be false, or did not believe it to be true, and that he *thereby* committed an offence under Section 193 of the Indian Penal Code.

BIRCH, J.—I concur with Mr. Justice Morris.

AINSLIE, J.—I am also of opinion that the conviction on a charge framed in the form given in the 3rd Schedule of Act X. of 1872 is good, although it may not declare which of the two statements set out in the charge is false. By Section 442 of the Act, a charge in that particular form is declared to be a good and valid charge. If it is a good charge to try a man on, it appears to me to follow of necessity that it must be a good charge to convict him on; and there is nothing in Section 461 which requires that the circumstances which constitute the offence should be set out in the conviction.

It appears to me that this is not a case which comes under the second part of the Section, which refers to offences punishable under different Sections, or parts of a Section, of the Penal Code, but that it falls under the first part of Section 461. If the Court comes to the conclusion that the accused person must

of necessity have given false evidence, it is sufficient, under the first part of Section 461, to state in the conviction that he has given false evidence, and is therefore punishable under Section 193 of the Penal Code.

MARKBY, J.—I am of opinion that a conviction in the form in which this prisoner has been convicted upon a charge in the same form is good in law.

It appears to me that this is a case to which the second Clause of Section 461 has no application. The offence of which the prisoner has been convicted is giving false evidence, and the Section of the Penal Code under which he has been convicted is Section 193. There is no necessity, therefore, for resorting to the alternative given in the second Clause of Section 461, and it need not be further considered.

Nor does it appear to me that Section 455 has any application either. There was not in this case "a single act or set of acts of such a nature that it was doubtful which of several offences the facts which could be proved would constitute." The facts which could be proved, even if they are to be treated as a single set of acts, could only constitute the offence of giving false evidence under Section 193, and no other.

The only question which it appears to me that we have to consider in this case is, whether a

charge in this form is sufficient. If it is sufficient, then it appears to me to follow as a matter of course that a conviction which follows the words of the charge must be good also. And whatever might otherwise be my opinion in the matter, I think we are precluded from saying that this is not a good charge, seeing that it is in the very form given by the 3rd Schedule, and the Act provides (Section 442) that the charge may be in the form therein given.

It is said that the Legislature will thus, by the form in which they have drawn the charge, have altered the definition of the offence of giving false evidence as given under the Penal Code, which was not their intention. I am not sure that this is the effect of what has been done. But even if it is so, the Legislature must I think be taken to have been aware, when they laid down these forms authoritatively, that the form in which a charge is laid does affect materially the evidence which is necessary to support it: and that by changing the evidence which is necessary to support a conviction for an offence, the nature of the offence itself may sometimes be changed. I think there could not be here any accidental omission or oversight. This form of charge must have been given to meet this very case. I think, therefore, I am bound to consider this to be a good charge, and to apply to it the usu-

nl rule which I understand to be this : that a charge is proved when all the material averments in it are proved. Here the finding is that all the averments *are* true, and a conviction in these terms is certainly a good conviction, though I should have thought it equally good if it had merely been that the prisoner was guilty of giving false evidence, as that would have been equivalent to a finding that the charge as laid was proved.

PHEAR, J.—The matter before us entirely depends upon the right construction to be placed upon certain portions of the existing Criminal Procedure Code ; and if, in considering the question which has been put to us in this reference, we were restricted from travelling beyond the limits of the actual text of that Code, I think I should be led without difficulty to the opinion that the verdict of the jury ought not merely to find that the one or the other branch of the alternative charge made against the prisoner in the present case is true, but ought to specify which of the two branches is true.

The charge is a statement, express and implied (Sections 439, 440) of the facts which the prosecution undertakes to establish by evidence against the accused, and several Sections of the Code are directed to enacting that it shall generally be precise, single, and unambiguous.

The prosecution may (with certain limitation) at one and the

same trial offer to the jury several views of the facts, either of one, so to speak, criminal occurrence or of several criminal occurrences, according to which views the prisoner's conduct in each occurrence amounts to the commission of a corresponding offence (Sections 452, 453, 454, 455.) If these are several views of the *same* occurrence, then the offence varies with the Section, or part of a Section, within which the particular view brings it: if they are views of several occurrences, then the corresponding offences may fall within the same Section. And it is important in reference to a Full Bench decision, which will be presently mentioned, to bear this distinction in mind.

These several views of the facts should generally be exhibited in a succession of distinct charges (Section 454), but (in the case at any rate of their being only alternative statements of one criminal occurrence) they may be put in the shape of an alternative charge (Section 455 explained by the illustration).

And whether alternative views of the facts of one criminal occurrence are exhibited in a series of charges, or in one alternative charge, if the *Court* is *doubtful* which is established by the evidence, it must expressly say so, and in that event will pass judgment in the alternative according to Section 72 of the Penal Code (para. 2, Section 461). In all other cases it would seem, at

ACT No. XI. OF 1874.

PASSED BY THE GOVERNOR GENERAL
OF INDIA IN COUNCIL.

(Received the assent of the Governor
General on the 5th May 1874.)

An Act to amend the Code of Criminal Procedure.

For the purpose of amending
the Code of Criminal
Procedure; It is
hereby enacted as

follows :—

1. In section two, after the
fourth paragraph, the
following shall be in-
serted, (namely) :—

“ The cases in which the Police
may arrest without warrant or not,
in the case of each offence under
the Indian Penal Code or any other
law referred to in section eight,

whether a warrant or a summons
shall ordinarily issue in the first
instance,

whether the offence is bailable or
not, and

the Court by which the offence
is triable,

are indicated respectively by the
third, fourth, fifth and seventh
columns of the fourth schedule
hereto annexed.”

2. To section four the following
clause shall be added
(namely) :—

“ In every part of this Code,
except where a contrary intention

appears from the context, words
which refer to acts done extend also
to illegal omissions.”

3. To sections eighteen and
thirty-six, the fol-
lowing words shall
be added (name-
ly) :—

“ or if he think further enquiry
or additional evidence upon any
point bearing upon the guilt or
innocence of the accused person to
be necessary, he may direct such
enquiry or evidence to be made or
taken.”

4. In section thirty-nine, after
the word “ limits,”
the following words
shall be inserted
(namely) : “ and may, with the
previous sanction of the Governor
General in Council, declare any
local area to be a District.”

5. To section forty-two, the
following clause shall
be added (name-
ly) :—

“ With the previous sanction of
the Governor General in Council,
the Local Government may dele-
gate, with such limitations as it
may think proper, to any officer
under its control, the power con-
ferred by the first clause of this
section.”

6. In section forty-four and the
first paragraph of
section forty-seven,
the word “ criminal”
shall be omitted.

7. To section forty-six, the following illustration shall be added (namely) :—

Addition to section 46.

Illustration.—A Magistrate of the third class having jurisdiction finds an accused person guilty, but considers that he ought to receive a more severe punishment than imprisonment for a term of one month, or a fine of fifty rupees. On recording the finding, submitting the proceedings and forwarding the accused to the Magistrate of the District, such Magistrate may pass a sentence on the accused including solitary confinement and whipping.”

8. In section fifty-nine, after the word “Court,” the words “inferior to a Court of Session” shall be inserted.

Amendment of section 59.

9. To the second paragraph of section sixty-three, the following words shall be added (namely) :—

Addition to section 63.

“Provided that such direction be not repugnant to any direction previously issued under the twenty-fourth and twenty-fifth of Victoria, cap. 104, section fifteen, or under section sixty-four of this Code.”

10. In section sixty-four, the proviso shall be repealed.

Proviso of section 64 repealed.

11. After section sixty-four, the following section shall be inserted (namely) :—

Power to transfer criminal cases from one High Court to another.

“64A. Whenever it appears to the Governor General in Council that it will promote the ends of justice or tend to the general convenience of parties or witnesses, he may, by notification in the *Gazette of India*, direct the transfer of any particular criminal case or appeal from one High Court to another High Court, or from any Criminal Court subordinate to one High Court to any other Criminal Court of equal or superior jurisdiction subordinate to another High Court.

“And the Court to which such case or appeal is transferred shall deal with the same as if it had been originally instituted in or presented to such Court.”

12. For the second paragraph of section seventy-five, the following shall be substituted (namely) :—

Amendment of section 75.

“When the offence, or one of the offences, complained of is punishable with death or transportation for life, the commitment shall be to the High Court.

“And where any person so committed is charged with several offences, of which one is punishable with death or transportation and the other with a less punishment, and the High Court considers that he should not be tried for the offence punishable with death or

transportation, the High Court may nevertheless try him for the other offence."

13. In section one hundred and eighty-six, for the words "charged before any Criminal Court with an offence," the following words shall be substituted (namely) :—

Amendment
of section 186.

"accused in any Criminal Court of an offence."

14. In section one hundred and ninety-five, Explanation III., for the word 'cannot,' the words "shall not ordinarily" shall be substituted.

Amendment
of section 195,
Explanation
III.

15. To section two hundred and two, clause first, the following words shall be added (namely) :
"unless the Magistrate is satisfied that such Government Pleader or other person is already aware of the commitment and the form of the charge."

Addition to
section 202.

16. To section two hundred and sixteen, the following explanation shall be added (namely) :—

Addition to
section 216.

"EXPLANATION III.—The charge shall be prepared as soon as the Magistrate is of opinion that a *prima facie* case has been established against the accused person, although the whole of the evidence for the prosecution may not have been completed."

17. In section two hundred and twenty-two, for paragraph (10), the following shall be substituted (namely) :—

Amendment
of section 222,
para. (10).

"(10.) Insult with intent to provoke a breach of the peace under section five hundred and four, and criminal intimidation under section five hundred and six, of the Indian Penal Code."

18. In section two hundred and thirty-one, for "section four hundred and seventy-two," the following words shall be substituted (namely) :—

Amendment
of section 231.

"Section thirty-three, section four hundred and thirty-five, section four hundred and seventy-two, or section four hundred and seventy-four."

19. To section two hundred and forty-seven, the following words shall be prefixed (namely) :—"The person conducting the prosecution shall then open his case, and"

Amendment
of section 247.

20. For the first paragraph of section two hundred and forty-nine, the following shall be substituted (namely) :—

Amendment
of section 249.

"When a witness is produced before the Court of Session or before the High Court in the exercise of its original or appellate criminal jurisdiction, the evidence given by him before the committing Magis-

trate may, in the discretion of the presiding Judge, be treated as evidence in the case, if it was duly taken in the presence of the accused person."

21. In the fourth paragraph of section two hundred and sixty-three, after the word "verdict,"

Amendment of section 263.

the words "of the jurors or" shall be inserted; and for the fifth and sixth paragraphs of the same section the following shall be substituted (namely) :—

"If the Court disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which the prisoner has been tried, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court. If the Court does so, it shall not record judgment of acquittal or of conviction on any of the charges on which the prisoner has been tried; but it may either remand him to custody or admit him to bail.

"The High Court shall deal with the case so submitted as it would deal with an appeal, but it may acquit or convict the accused person on the facts as well as law, without reference to the particular charges as to which the Court of Session may have disagreed with the verdict; and if it convict him, shall pass such sentence as might have been passed by the Court of Session."

For section two hundred and seventy-one, the following sections shall be substituted (namely) :—

Amendment of section 271.

Appeal from sentence of Sessions Judge.

"271. Any person convicted on a trial held by a Sessions Judge may appeal to the High Court.

"An appeal may lie on a matter of fact as well as a matter of law, except where the conviction was in a trial by jury, in which case the appeal shall be admissible on a matter of law only."

"271A. When any such person is sentenced to death, the Sessions Court shall give him a copy of the sentence and inform him that, if he wishes to appeal, his appeal must be made within seven days; and the Court shall delay the transmission of the reference hereinafter required for a reasonable time not exceeding seven days to allow of the appeal and reference being made at the same time.

"When it appears that the execution of the sentence should not be delayed, the Sessions Court may forward the reference at once, recording its reasons for so doing."

"271B. Where the Judges composing the Court of appeal, reference or revision are equally divided, the case, with their opinions thereon, shall be laid before another

Procedure where Judges of Court of appeal, &c., are equally divided.

Judge, and such Judge, after such examination and hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion."

23. In the second paragraph of section two hundred and seventy-two, for the words "and the rules of limitation shall not apply to appeals presented under this section," the following clause shall be substituted (namely):—"No appeal shall be presented under this section after six months from the date of the judgment complained of."

24. In the second clause of section two hundred and seventy-four, the last twenty words shall be omitted, and to the section the following explanation shall be added (namely):—

"EXPLANATION.—A sentence by which imprisonment is awarded in default of payment of fine, is not a sentence by which two or more punishments are combined, within the meaning of the second clause of this section."

25. For section two hundred and seventy-six, the following shall be substituted (namely):—

"276. If any person affected by a sentence or other order passed by a Criminal Court desires to have a copy of the Judge's charge to the jury or of any other

proceeding not being the judgment or order provided for by section four hundred and sixty-four, he shall, on applying for such copy, be furnished therewith provided that he pay for the same, unless the Court, for some special reason, sees fit to furnish it free of cost."

26. To section two hundred and seventy-eight, the following clause shall be added (namely):—

"In rejecting an appeal under this section, the Appellate Court shall not enhance the sentence."

27. To section two hundred and seventy-nine, the following words shall be added (namely):—

"and in cases under section two hundred and seventy-two, where the Appellate Court decides to hear the appeal, it shall also cause notice to be given to the respondent."

28. To the first clause of section two hundred and eighty, the following words shall be added (namely):—

"or order the appellant to be retried."

29. In the second paragraph of section two hundred and ninety-six, the words "Provided that" shall be omitted and the following words shall be added (namely):—"upon the matter of such complaint or of which the accused person has been, in the opinion of

Amendment
of section 272.

Amendment
of section 278.

Amendment
of section 274.

Amendment
of section 279.

Amendment
of section 276.

Amendment
of section 280.

Copies of
proceedings.

Amendment
of section 296.

the Court or Magistrate, improperly discharged.

“ Provided that, if in the opinion of such Court or Magistrate, the evidence shews that some other offence has been committed by the accused person, such Court or Magistrate may direct the Subordinate Court to inquire into such offence.”

30. In the third paragraph of section two hundred and ninety-seven, for the word “inconveniently” the word “incorrectly” shall be substituted.

31. For section two hundred and ninety-eight, the following shall be substituted (namely) :—

“ 298. The High Court or the Court of Session may direct the Magistrate of the District, by himself or by any of the Magistrates subordinate to him,

“ or the Magistrate of the District may direct any subordinate Magistrate,

“ to make further inquiry into any complaint which has been dismissed under section one hundred and forty-seven.”

32. For the fourth paragraph of section three hundred and two, the following section shall be substituted (namely) :—

“ 302A. In cases tried by any Court inferior to a Court of Session, where the accused person is sentenced to imprisonment, the Court shall forthwith forward him

with a similar warrant for the execution of the sentence to the officer in charge of the jail of the District in which the trial was held :

“ But where the accused person is sentenced to whipping, the sentence may be executed at such place and time as the Court may direct.”

33. In the third paragraph of section three hundred and eleven, after the word “Magistrate,” the words “or a Superintendent of a Jail” shall be inserted.

And in the first and second paragraphs of section three hundred and twelve, after the word “Magistrate,” the words “or Superintendent” shall be inserted.

34. To the first clause of section three hundred and twenty-two the following words shall be added (namely), “ or grant a reprieve or respite in respect of such sentence,” and the following clauses shall be added to the same section (namely) :—

“ This section applies to all punishments inflicted by the High Court. Provided that nothing herein contained shall be deemed to interfere with the right of Her Majesty to grant pardons, reprieves, respites or remissions of punishment :

“ When any fine or forfeiture is imposed on any person for any of-

fence, the Governor General in Council or the Local Government may (subject to the provisions of section three hundred and eight) direct that a share or proportion of such fine be paid over to the prosecutor towards defraying his expenses, as the Governor General in Council or the Local Government thinks fit."

35. After the second paragraph of section three hundred and thirty, the following shall be inserted (namely) :—

"If the witness is within the local limits of the ordinary original criminal jurisdiction of any of the High Courts of Judicature at Fort William, Madras and Bombay, the Court dispensing with his personal attendance may direct a commission to any Police Magistrate within such limits, and such Police Magistrate shall have the like power to compel the attendance and examination of witnesses as he possesses for that purpose in cases pending before him."

And in the third paragraph of the same section, for the words "to which," the words "upon which" shall be substituted, and for the words "cause a return to be made," the words "shall examine the witness" shall be substituted, and after the word "Magistrate," the words "or Police Magistrate" shall be inserted.

And after the fourth paragraph of the same section, the following

paragraph shall be inserted (namely) :—

"After any commission issued under this section has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court out of which it issued; and the commission, the return thereto, and the deposition of such witness may be used as evidence in the case and shall form part of the record."

36. In section three hundred and seventy-nine the following words shall be omitted (namely), "by or under the direction of an officer in charge of a Police-station, or by a Police officer making an investigation."

37. In the second paragraph of section three hundred and ninety-eight, for the words "accused person," the words "party or witness" shall be substituted.

38. In section four hundred and eighteen, before the word "trial," the words "inquiry or" shall be inserted;

and to the same section the following explanation shall be added (namely) :—

"EXPLANATION.—In this section the term 'property' includes not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the

same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

39. To section four hundred and twenty-five, the following clause shall be added (namely) :—

"The trial of the fact of the unsoundness of mind of the accused person shall be deemed to be part of his trial before the Court."

40. For the first sentence of the illustration to section four hundred and fifty-one, the following shall be substituted (namely) :—

"A is convicted of an offence under section 196 of the Indian Penal Code upon a charge which omits to state that he knew the evidence which he corruptly used or attempted to use as true or genuine, was false or fabricated."

41. For the second paragraph of section four hundred and sixty-four, the following shall be substituted (namely) :—

"The judgment or order shall be explained to the accused person or person affected by it, and on his application a copy thereof shall be given to him without delay free of cost and in his own language, if practicable, if not, in the language of the Court."

And to the seventh paragraph of the same section, the following words shall be added, (namely) :—

"where such error or defect is in a matter not affecting the merits of the case."

42. To section four hundred and sixty-six, the following clause shall be added (namely) :—

"In this section the expressions 'Judge' and 'public servant' shall be taken to have the meaning assigned to them respectively by the Indian Penal Code."

43. Chapter XXXVI. (*Of the Dispersion of unlawful Assemblies*) shall be deemed to apply to the towns of Calcutta, Madras and Bombay, and the word "Magistrate," wherever it occurs in the said chapter, shall be deemed to include a Magistrate of Police.

44. To section five hundred and three, the following words shall be added (namely) :—
—"And in case such penalty cannot be so recovered, the surety shall be liable, by order of such Magistrate, to imprisonment in the civil jail for a period not exceeding six months."

45. In section five hundred and twenty-seven, for the words "four hundred and twenty-one," the words "five hundred and twenty-one" shall be substituted.

16. In the third column of the fourth schedule to the Code of Criminal Procedure, opposite No. 323, for the words "Shall not arrest without warrant," the words "May arrest without warrant" shall be substituted; and opposite No. 128, for the word "Ditto," the words "May arrest without warrant" shall be substituted.

47. In this Act, "section" means section of the Code of Criminal Procedure.

And all references to the Code of Criminal Procedure made in Acts heretofore passed or hereafter to be passed as if made to such Code as amended by this Act.

Interpretation
of "section"
Procedur

Reference to
Code of Criminal
Procedure.

Names	Amount	Date of expiry of present subscription.
Motilal Lalbhai, Esq., <i>Sub. Judge, Borsad, Gujerat,</i> ...	Rs. 10	December, 1874.
Baboo Chunder Narain Singh, <i>M. A, Deputy Magistrate, Khoolneah,</i> ...	Rs. 10	Do.
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Baboo Rajnarain Singh, <i>Pleader, Contai,</i> ...	Rs. 5	April, 1875.
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CHAPTER I.

THE PROVINCE OF CRIMINAL LAW.

THE object of this chapter is to show what is the subject-matter to which criminal law relates, and what are the component parts of which by the nature of the case it must consist. First, then, what is a law, and what is a crime?

A law is a command enjoining a course of conduct. A command is an intimation from a stronger to a weaker rational being, that if the weaker does or forbears to do some specified thing the stronger will injure or hurt him.* A crime is an act of disobedience to a law forbidden under pain of punishment. It follows from these definitions that all laws are in one sense criminal, for by the definitions they must be commands, and any command may be disobeyed.

This consequence may appear paradoxical, but it is true. To common apprehension, the laws of inheritance are absolutely unrelated to the criminal law, yet, in fact, they repose upon it. Thus the law is that the eldest son is heir-at-law to his father. This means that all persons,

except the eldest son of man—if he has one—mandated by the sovereign power not to exercise proprietary rights over the land which belonged to him, unless they can show a title to do so. If they should exercise such rights and should fail to show such a title, the sovereign would command the sheriff to give possession of the land to the heir-at-law, and to make the intruder pay the costs of the suit; and if the sheriff should fail to execute that command, he would be liable to punishment (amongst other things) by an indictment for not obeying the lawful commands of the sovereign, and to fine and imprisonment on conviction under that indictment. Thus, the ultimate meaning of the phrase, "By law the eldest son is heir to the father," is, that the sovereign commands all persons to act upon that rule, and will, if necessary, force them by the terror of legal punishment to do so. Legal maxims may appear to stand even further from the criminal law than the law of inheritance. It may be said the maxim that the king never dies is part of the law of England, but how can this be resolved into a command? The answer is, that this and other maxims of the same kind are to a great extent

* Austin's Prov. of Jurisprudence, Lect. I.

subject to the will of courts of justice, which are entrusted by the tacit consent of the sovereign power with a certain discretion in their interpretation, and are to that extent legislators. To the extent of that discretion these maxims are certainly not laws at all, but beyond that discretion they are laws and might be personally enforced. If, for example, a judge, being called upon to apply to a given case the maxim that the king never dies, were expressly to refuse to do so, that refusal might be evidence of judicial misconduct for which he might be made answerable by impeachment or by a criminal information. The extreme improbability of the case has nothing to do with the justice of the principle. The general doctrine well established in English law, that it is a misdemeanor to disobey the lawful commands of the king or the provisions of a public act of parliament, is in exact accordance with it.

Though the notions of law and crime are thus, in reality, correlative and co-extensive, and though the phrase "criminal law" may thus be accused of tautology, it may be and generally is used in a sense definite enough for practical purposes,

but much narrower. Laws relating to murder, theft, or robbery, would be included under the head of criminal law; whilst those which refer to contracts, inheritance, administration, shipping, landlord and tenant, and the like, would not. What, then, is and what ought to be the principle of this distinction? The first question must be answered by reference to the common use of language, the second by reference to the nature of the things to be classified. According to the common use of language, a crime means something more than mere disobedience to law: it means an act which is both forbidden by law and revolting to the moral sentiments of society. Robbery or murder would, in common language, be described as crimes, but a trifling offence against the revenue laws would not; but this way of using language, though vivid, is obviously altogether indefinite. For example, it is agreed on all hands that murder is, in the popular use of language, a crime, but what in the popular use of language is a murder? Many acts which the law qualifies by that name would excite little or no feeling of moral detestation. In many states and classes of so-

ciety they might excite the reverse. For example, a man in a fair duel shoots another for seducing his sister. An American soldier, in the war of Independence, rescues a brother insurgent by shooting an English soldier who had captured him. A man shooting at a domestic fowl with intent to steal, accidentally wounds a person with a stray shot corn, and the wounded man dies of lock-jaw six months afterwards. A midwife puts to death a monstrous birth which, though it had human shape, could not have lived to maturity. Two lovers agree to poison themselves together, one provides the poison, each partakes of it, the one who provided it recovers. Each of these cases is a case of wilful murder; each, therefore, is a capital crime, but in a moral point of view they differ endlessly; and whilst the common use of language might describe some of them as crimes, it would describe others as errors, and possibly approve of some as virtuous acts. It is clear, therefore, that the popular use of language throws no light on the question what sort of violations of law are emphatically crimes.

When we inquire what ought to be the principle on which the question should be determined,

we must look at the nature of the things to be classified; and here a broad distinction suggests itself. Though all laws are commands, and as such may be broken, yet it is not every breach of every law by every person in every capacity for which punishments are provided. In the case just mentioned of the law of inheritance, the law issues a variety of commands in reference to the property of the dead man. It commands all persons, except the heir-at-law, to abstain from it without special grounds. It commands the judges to adjudicate upon the existence of those special grounds, if lawfully required to do so, and it commands the sheriff to enforce the judgment which they deliver. The commands to the judges and the sheriff would in case of need be enforced by punishments, but the general command to the world at large, to abstain from intermeddling, is in general enforced only by the circumstance that, if men do intermeddle, they will have to pay damages and costs to the lawful heir. Unless their misconduct assumes such a form as to become theft, or some other act specifically forbidden under a specific sanction, it is not punished at all.

The definition of crimes may, therefore, be conveniently res-

tricted to acts forbidden by the law under pain of punishment. This definition, however, requires further explanation; for what, it may be asked, is a punishment? Every command involves a sanction, and thus every law forbids every act, which it forbids at all, under pain of punishment. This makes it necessary to give a definition of punishments as distinguished from sanctions.

The sanctions of all laws of every kind will be found to fall under two great heads: those who disobey them may be forced to indemnify a third person either by damages or by specific performance, or they may themselves be subjected to some suffering. In each case the legislator enforces his commands by sanctions, but in the first case the sanction is imposed entirely for the sake of the injured party. Its enforcement is in his discretion, and for his advantage. In the second, the sanction consists in suffering imposed on the person disobeying. It is imposed for public purposes, and has no direct reference to the interests of the person injured by the act punished. Punishments are thus sanctions, but they are sanctions imposed for the public, and at the discretion and by the direction of those who represent the public.

It may be worth while to observe that there is a distinction between a punishment and a penalty. The legislator sometimes chooses to deter men from particular courses of conduct, not by affixing a specific punishment to acts done in pursuance of them, but by providing either that any one who pleases, or that particular persons, if they please, may regard such acts in the light of private wrongs, and recover a specific indemnity in respect of them. This is the case with all statutes which authorize common informers to sue for penalties in respect of breaches of law, and also with regard to some of the provisions of the Revenue Acts, under which the Attorney-General can proceed, if he thinks fit, as for a penalty. Penalties differ from punishments in the fact, that they are enforced at the discretion and for the benefit of the informer. They differ from damages in the fact that no personal injury has been done to the informer, and that the penalty which he recovers is in substance a reward for his vigilance in detecting a breach of the law, and not an indemnity for personal loss sustained by it.

This account of the province of criminal law is confirmed by several judicial decisions. The

act by which parties to a suit are rendered competent witnesses does not apply to "criminal proceedings," and the question has several times arisen, whether a particular proceeding was criminal within the meaning of the act. The result of the cases appears to be, that the infliction of punishment in the sense of the word just given is the true test by which criminal are distinguished from civil proceedings, and that the moral nature of the act has nothing to do with the question.*

Crimes being thus defined as acts punished by law, criminal law may be defined as that part of the law which relates to crimes, and it will at once become apparent that these definitions extend the sphere of criminal law considerably beyond the narrow routine of the cases which usually occupy the criminal courts. In this country an immense mass of affairs, which in other parts of the world fall under the head of civil administration, are transacted by the help of the criminal law. For example, the law of nuisances is a branch of the criminal law. A public nuisance is a

misdemeanor punishable by fine and imprisonment, and it consists in doing anything which is an annoyance to all the Queen's subjects. It is under this head that questions about the legality of carrying on particular trades in particular situations, the liability to repair highways, and the sufficiency of their state of repair, the lawfulness of erections in rivers, on the sea-coast, or on or near bridges, and the like, are decided. The remedy for improper conduct in these respects is an indictment on which the offender is tried as on any other criminal charge. If he is convicted, an opportunity is in practice given him of abating the nuisance; but if he failed to do so, substantial punishment would be inflicted. This peculiarity in our system may be traced to historical causes, which are more largely referred to and illustrated below. It is sufficient in this place to observe that they illustrate the general proposition, that the province of criminal law must not be supposed to be restricted to those acts which popular language would describe as crimes, but that it extends to every act, no matter what its moral quality may be, which the law has forbidden, and to which it has affixed a punishment.

* *Att.-Gen. v. Radloff*, 10 Exch. 84. Compare *Cattell v. Ireson*, 27 L. J. M. C. 167. In *Berry's case*, Bell, Cr. Ca. 68, it was held that a bastardy summons is not a criminal proceeding.

"Penal" would be a better phrase than "criminal" law, as it points out with greater emphasis the specific mark by which the province of law to which it applies is distinguished from other provinces; for the distinction arises not from the nature of the acts contemplated, but from the manner in which they are treated. Crimes frequently come under the cognizance of the law not only as crimes, but for other purposes, and as such form the subject-matter of laws which are not, in any sense of the word, penal. Many crimes, for example, are civil injuries, and as such may be made the subject of actions for damages independently of penal proceedings. This is the case with most assaults, with libels, and with some kinds of frauds. A person committing such acts may either be punished on conviction on an indictment, or compelled to pay damages, on a verdict in a civil action. The act remains the same in each case, though the consequences which it involves differ according to the mode in which it is treated.

This simple view of the matter avoids the difficulty, which has exercised some ingenuity, of attempting to distinguish between crimes and torts. The two terms do not exclude each other,

and, therefore, cannot be distinguished. To ask whether an act is a crime or a tort, is like asking whether a man is a husband or a brother. Whatever is within the scope of the penal law is a crime; whatever is a ground for a claim of damages, as for an injury, is a tort: but there is no reason why the same act should not belong to both classes, and many acts do. Indeed, crimes may come under the cognizance of the law neither as crimes nor as torts. For example, bigamy is a cause of divorce; arson, by the party insured, would be a good defence by an insurance company to an action on a policy. In each of these cases, a crime would be judicially proved before a court of justice; yet the crime would be viewed by the court neither as a crime nor as a tort, but simply as an act affecting the status or the money liability of other persons. It follows from this that the consequences charged upon an act by law, and not the nature of the act itself, is the specific difference by which crimes are distinguished.

Such being, in general, the nature of crimes and of criminal law, what are the elements of which, from the nature of the case, it must be composed? The

first and chief division is twofold. Every system of criminal law must be composed, *first*, of laws forbidding specified acts under specified punishments; and, *secondly*, of laws by which these general provisions may be applied to particular cases. The first of these divisions may be described as the law of crimes and punishments; the second as the law of criminal procedure.

The law of crimes and punishments must consist of three parts: *first*, General principles, determining what are the elements which must concur in order to constitute an act of disobedience to a law; *secondly*, Definitions of crimes; and, *thirdly*, The apportionment of punishment.

The law of criminal procedure consists of four parts—*first*, The preliminary proceedings; including the taking security, by imprisonment or otherwise, for the appearance at the trial of the suspected person, the collection of evidence against him (called, in the French system, the instruction of the process), and his formal accusation; *secondly*, The regulation of the trial; *thirdly*, The rules governing the evidence produced at the trial; and, *fourthly*, The infliction of punishment. These divisions are inherent in

the subject, and must exist, under some form or other, in every nation, and under every conceivable system.

Independently of these broad general divisions, which must apply to every legal system whatever, certain features, peculiar to each particular system, affect the character of every part of it. The skeleton of the criminal law, in every country, is on the same general plan; but the shape of the members, their proportionate importance, and general appearance, differ widely; so that there is a corresponding difference in the functions which they are fitted to discharge.

Laws, in different countries, may be, and are, made and abrogated in very different ways; they are contained in very different repositories; they propose to themselves different objects; they are animated by a different spirit; and these differences show their traces in every part of every system. In some countries the definitions of crimes are more complete than in others. In some, punishments are severe; in others, lenient. In some, the procedure is favourable to the accused; in others, to the prosecutor. The rules of evidence differ widely. In France, for example, they can hardly be said

to exist at all. In England, they form one of the most prominent and characteristic parts of the system. The peculiar character of particular systems, in these and other analogous particulars, can be estimated only by historical inquiries.

CHAPTER II.

THE DEFINITION OF CRIMES IN GENERAL.

THE general definition of crimes as already given is, that they are actions punished by the law. Certain qualities are or are supposed to be common to all actions which the law punishes, and the existence of those qualities in the particular case is a necessary condition of criminality. As their existence is assumed in the first instance, it is more to the purpose to say that their absence in any particular case disproves criminality. Hence the examination of the definition of particular crimes must be preceded by an examination of the elements common to all crimes as such, which is the subject of the present chapter.

The elements common to all crimes, as such, are of two kinds—those which belong to crimes as actions, and those which belong

to all actions punished by the law. First, then, what is an action? An action is a set of voluntary bodily motions combined by the mind in reference to a common object. This definition asserts, first, that an action is a combination of certain external motions, with certain internal sensations, the existence of which, in the person moving, is inferred from the fact that similar motions on the part of the observer are preceded and accompanied by such sensations.

The inference is made with so little consciousness, that the fact that it is an inference may deserve notice. All that any one person can, under any circumstances, positively know of any other is, that his body is of a certain shape, colour, &c. and that on particular occasions it moves in a certain way. The expression of the face, the tones of the voice, are all composed of or produced by subtle motions of different muscles and the flesh and skin which cover them. Every form of intellectual exertion, every impulse of passion, has to be translated into muscular or nervous motion of some sort before it can be signified to any one, perhaps even to the person who feels it. Much may be expressed by the glance of the eye or a motion of the

nostril, but unless the eyeball or nostril does actually move the information will not be given. Human actions thus consist primarily of bodily motions, from which we infer the presence of inward sensations; and when we ascribe action to a person we mean to assert that, by reason of certain inward sensations, his body moved in a certain manner—the motions affording the evidence from which we infer the existence of the inward sensations.

The use of active verbs always asserts an action real or metaphorical—real for the most part when the nominative case denotes a living being, metaphorical when it denotes a thing. For example, such expressions as “the man walks,” “the fish swims,” assert real actions. Such expressions as “the spark lights the powder,” “the powder drives the bullet,” “the bullet strikes the man,” assert metaphorical actions. They personify, for the sake of convenience and vivacity, the spark, the powder, and the bullet. The difference between the two classes of expression is, that in the first case the speaker does, and in the second he does not, mean to assert that the visible occurrence of a body moving along the earth or through the

water is accompanied and preceded by a set of sensations or, if the expression is preferred, states of consciousness, inside that body, like those which he would experience in his own person before and at the time of similar changes in its position.

The sensations which accompany every action and distinguish it from a mere occurrence are intention and will. The first step towards an action is, that, to use a common and expressive phrase, it “occurs to the mind.” A mental image more or less definite of the thing to be done is formed by the imagination. The next step is deliberation whether or not the thing shall be done, and this terminates in a mental crisis, which constitutes the resolution to do it. The next step after resolving upon the act is the selection of means for its execution, and during the whole period over which this preparation extends the person is said to intend to do the act. This original metaphor which suggested the word is, like all such metaphors, most expressive. Intention is “stretching towards” fixing the mind upon the act, and thinking of it as of one which will be performed when the time comes. When at last the opportunity arrives, a second crisis or

spasm takes place. The man wishes in that peculiar way which is called willing, and thereupon the different members of his body go through certain motions. The muscles of the calves and thighs raise the trunk; the head and the hands assume a certain position; the shoulders are thrown back; the head is erected; the tongue, the mouth, the throat, and the cheeks, all do their parts in saying what the man has thought of saying, resolved to say, intended to say, and now says. What the nature of this crisis is, how such a wish differs generically from other wishes, why it instantly fulfils itself, are questions which have never been answered; but about the fact there can be no doubt. Every human creature attaches to the words "to will," or their equivalents, as vivid a meaning as every man with eyes attaches to the words "to see."

To will is to go through that inward state which, as experience informs us, is always succeeded by motion, whilst the body is in its normal condition. Will may probably exist without any corresponding motion, as in the case of palsy; though even in that case organs with which we are unacquainted may move, though not so as to move those which the person willing intended to

move. Motion may occur without will, as in the case of convulsions; and there is a large class of bodily motions, as the beating of the heart, which appears to be independent of the will.

This, however, does not affect the assertion that there is a large class of motions which are caused by exertions of the will, which are always preceded by such exertions, and which always follow them. These bodily motions, together with the mental antecedents inferred from them, are actions. An infinite number of bodily motions are essential to almost every action. Hundreds, perhaps thousands, of them are combined whenever a man writes a letter or reads a book. Probably each of these motions requires an exertion of the will. That which combines and co-ordinates them towards one common end is the intention, the contemplation by the mind of one common result towards which they are all directed.

An action, therefore, may be said to consist of occurrence to the mind, deliberation, resolution, intention, will, and execution by—or if the expression be allowed, translation into—a set of bodily motions co-ordinated towards the object intended. This process, and every step in it, may be

compressed into an infinitesimally small space of time, or extended over many years, and all the stages run into each other, for a man may be irresolute even whilst he is executing his purpose, and he must continue to intend whilst he wills it; but in order that there may be any action at all, the will which causes, and the intention which co-ordinates bodily motion must always be present. The absence of both or either would prevent the action from taking place at all or reduce it from an action to a mere occurrence, and in either case there would be no crime.

In order to illustrate this, cases may be put to show the effect of the absence of both or either. First, will and intention may both be absent. A man in a convulsive fit strikes another and kills him. He has committed no crime, because he has done no act. He has been acted upon. His muscles did not contract in consequence of an act of the will. His motions were not co-ordinated towards the blow which his arm struck, by any mental contemplation of the blow itself. In other words, he neither willed nor intended the act. Injuries done in a convulsive fit would not, therefore, be done by the sick man, and the case would be

the same as if a third person had pushed him against the person hurt, and so done the mischief. It is doubtful whether such an incident would be a ground even for a civil action. It closely resembles the case of a diseased person infecting another without fraud or negligence.

Secondly, will may exist without intention. This case is best illustrated by the motions of an infant. A new-born child moves its hands and arms and lays hold of anything put between its fingers. Every analogy leads us to believe that these motions are voluntary, that they are preceded by an exertion of the will generically similar to exertions of the will in adults; but the co-ordination of such motions towards an object specifically contemplated is a habit which children learn by degrees, and do not thoroughly master for several years. Probably, somnambulism and other movements during sleep are of the same kind. They are voluntary; but as they are not co-ordinated with a view to any definite result, they are not accompanied by any intention. Hence, if a man killed another in his sleep, there would be no crime, because there would be no intention, and therefore no action. A series of voluntary

bodily motions would have taken place, but they would not have been co-ordinated by the mind towards the result which they actually produced.

Thirdly, intention may exist without will. This happens in the common case of a person who lays aside a plan which he has formed. Here there is obviously no action; but it is conceivable, though scarcely possible, that the event intended might occur without an act of the will, in which case there would be no crime. In order that this might happen, the bodily motion necessary to bring about the purpose intended must be caused by some other means than an act of the will. Such an occurrence is so improbable, that it might be called impossible; but cases of the kind may, for the sake of illustration, be imagined. Suppose a man having resolved to push another over a cliff, and having approached him for that purpose, were to be seized with a convulsion fit by which his arm received the very impulse it would otherwise have received from his own will. This would be a case of intention without will; and if the existence of such a state of facts were proved (which would, of course, be practically impossible), guilt would be dis-

proved, for the act does not begin till the series of motions which constitute its execution has actually begun to take place under the influence of the will. The nearest case to this which ever occurs in practice is where a man acts from what is alleged to be an insane and uncontrollable impulse remotely caused by the will. An illustration of this occurred in the case of William Dove, which is described and discussed below.

Will and intention, thus explained, are essential elements of every crime whatever, and are charged in every indictment, by the use of the active verb, to which the prisoner's name is the nominative case. When the jurors present that A did murder B, they assert that A's will caused his bodily members to go through certain motions which his mind co-ordinated, so as to produce a certain act—such as cutting, stabbing, poisoning, &c.—which act was the cause of B's death. Hence it would be an answer to the charge to show either that the bodily motions were not caused by an act of the will, or that, though so caused, they were not co-ordinated with a view to the effect produced. The first of these topics arises most frequently where the defence is insanity;

the second is one of the commonest of all topics. For example, one man stabs another and kills him. The defence is, that the wound was given accidentally. This does not mean that the motion of the hand and the arm, whereby the knife was driven into the man's body, were involuntary, but that they did not form part of a system of motions of the different members of A's body so co-ordinated as to produce that result; that the fatal raising of the hand was not part of A's aggression on B, but part of another system of motions—those, for example, which composed collectively his defence of himself against C.

In indictments in the old form all the circumstances of a murder (for example) were set out minutely, thus—"The said J. O'B., "with a certain stick of the "value of 2d. which he the said "J. O'B., in his right hand, then "and there, had and held, the "said B. G. then and there "feloniously, &c. did strike, beat, "bruise, and wound, and the said "J. O'B., with the stick aforesaid, so held by him as aforesaid, the said B. G. in and upon "the right side of the head, of "him the said B. G. did strike, "beat, and wound; giving to him, "the said B. G., then and there,

"with the stick aforesaid, so as "aforesaid, by the said J. O'B., "then and there, had and held as "aforesaid, in and upon the said "right side of the head of him "the said B. G., one mortal "wound of the length of three "inches, and the depth of one inch, &c." * In one point of view this was childish enough, but it had the incidental advantage of showing a clear perception of the nature of actions as consisting not in any one determinate or assignable motion of the body, but in a variety of such motions tending towards one purpose and accompanied and preceded by certain states of mind.

The result of the whole is that an action consists of voluntary bodily motions combined by the mind towards a common object. Intention is in every case essential to crime, because it is essential to action, and every crime is an action, as appears from the use of active verbs in every indictment.

Such are the mental conditions which belong to a crime as an action; but other mental conditions are attached to actions before they can be punished by law. No action is criminal in itself, unless the intent, the mental element of it, is a state of mind

* O'Brien's Case, 1 Den. Cr. Ca. 10.

forbidden by the law. This state of mind varies according to the nature of the case. To utter a forged note is no crime unless there be a knowledge that the note is forged, and also an intent to defraud. In order to bring a person within the statute which makes the infliction of certain bodily injuries felony, there must be a specific intent to commit murder or to inflict grievous bodily harm. Killing is no murder unless there be malice. The appropriation of the property of another is not theft unless it is felonious. In short, in order to be a crime, an action must not only be intentional in the general sense already explained, but it must be accompanied with a specific intention forbidden by the law in that particular case.

In some cases this specific intent is defined by the law which creates the offence, as, for example, in the case of wounding with intent to maim or disfigure, but it is more frequently denoted by the general term "malice." Malice may thus be said to be a necessary ingredient in one form or other of all crimes whatever, though in some cases it must assume a particular shape in order to constitute a specific crime. Hardly any word in the whole range of the criminal law has

been used in such various and conflicting senses, nor is there any which it is more important to understand correctly. The following explanation of it is derived, not from any specific authority, but from a comparison of the different senses in which the word is used, and from a consideration of the nature of the case.

The etymological meaning of the words malice and malicious is simply wickedness and wicked. Great and reasonable reluctance has always been felt by lawyers to recognise moral distinctions in matters of law. The best conceivable system of criminal law would be based upon a set of definitions of crimes so worded as to denote by the mere literal sense of the words every action intended to be punished, and no other; and inasmuch as all the terms in which propositions respecting morality are expressed are more or less indefinite, whilst controversies apparently endless have always prevailed as to the nature of morality itself, the introduction of words relating to morality into the administration of justice must (it is considered) produce confusion and uncertainty.

This is perfectly true; but on the other hand it is also true

that, indefinite and unscientific as the terms may be in which morality is expressed, the administration of criminal justice is based upon morality. It is rendered possible by its general correspondence with the moral sentiments of the nation in which it exists, and if it habitually violated those sentiments in any considerable degree it would not be endured. It is, therefore, absolutely necessary that legal definitions of crimes should be based upon moral distinctions, whatever may be the difficulty of ascertaining with precision what those distinctions are; and it will be found in practice impossible to attach to the words "malice" and "malicious" any other meaning than that which properly belongs to them of wickedness and wicked.

It is easy to exaggerate the vagueness of these words. In reality, the difficulty lies not in the use of the words themselves, but in the theories by which we try to explain them. The proposition that lying is wicked is understood by millions who are ignorant of the very existence of all moral theories whatever. It means that, in point of fact, it is blamed and under certain circumstances punished. The reasons why it is blamed and punished are collateral to the fact, and

it is with the fact and not with the theories about them that the law is concerned.

Whatever may be the want of precision of these words, it has in practice been remedied by experience. The consequence of making malice in general terms a necessary element of crime is, that certain acts, as, for example, the destruction of life, or the appropriation of what belongs to another, are declared to be *prima facie* wicked actions, though circumstances may exist by which their wickedness is either removed or diminished. In the course of time experience shows what these circumstances are, and thus a technically exact conception of both theft and murder is gradually attained, although the original definition of each contained a term which was indefinite when it was first used. Thus in the case of murder, when one man kills another, the presumption is that he did so maliciously, and so committed murder; but this presumption may be rebutted by showing that the act was done in self-defence, or under certain specified provocations, or by certain forms of negligence.

If it be asked why, under these circumstances, the term malice should be retained, and why murder (for example) should not

be defined to mean the killing of a man under any other circumstances than those specified, the answer is, that the word is convenient, because it sums up in a significant way many distinct propositions; and also because it is possible, though improbable, that new cases may arise in which it would be necessary to use it in its natural sense. Suppose, for example, that in a wreck, fire, or other catastrophe, a bystander were to kill one person for the sake of saving another; the question whether or not this was murder would turn on the question whether it was or was not identical in principle with acts which the law has determined to be malicious or wicked. The general result of the use of the word malice, and of the doctrine that malice is an essential element of crime, is to throw upon persons who commit acts of a particular class the burden of proving that they were not done under the circumstances contemplated by the legislature, but at the same time to permit them to give evidence to that effect.

The degree of vagueness thus introduced differs in different cases. In some instances a good deal still remains. The law against malicious injuries to property supplies a good illustration.

By the 24 & 25 Vic. c. 97, s. 51, punishments are provided for persons who "unlawfully and maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever," to the value of £5 or upwards. A man breaks a valuable article—a vase or a statue in a shop. If the evidence proved that he had done so by a voluntary and intentional act, it would be presumed to be a malicious one, unless he could rebut the presumption, but he would be at liberty to rebut it. Suppose, for instance, he could prove that he supposed that he had the owner's leave to do what he did—this would be a defence to an indictment, because it would disprove malice, but the act would still be unlawful, and would expose the wrong doer to a civil action. His conduct might be foolish, but would not be wicked; it would entitle the owner of the article to compensation, but would not expose the agent to punishment.

This illustration proceeds on the principle that malicious means wicked, and its truth can be denied by no one who is not prepared to contend that the word "malicious" in the statute referred to is mere surplusage, and that the law subjects to

imprisonment and hard labour, or if the act complained of be done at night, to penal servitude, every person who exposes himself to a civil action for damaging his neighbour's property. No doubt the word "maliciously" in the act in question is as yet extremely vague, whilst the "malice afore-thought" charged in indictments for murder is perfectly, or almost perfectly, specific; but the reason of this is that the importance and antiquity of the second phrase have made it the subject of so many judicial decisions that it has been reduced to certainty, whereas the word "maliciously" in the modern act has not. Judicial legislation has determined what sorts of killing are wicked, but it has not determined with anything like the same precision what sorts of injuries to property are wicked.

The practical importance of this inquiry into the constituent elements of crime is best shown by its application to the question of responsibility; that is, the question, whether any and what classes of persons ought to be exempted from punishment for their crimes. If a crime is defined as an act punished by the law, this question suggests a contradiction in terms, for where there

is no liability to punishment, there can be no crime. A question substantially the same may be put in another shape—whether there can be any general causes which prevent actions from being criminal which would otherwise have been so? The foregoing observations supply the answer. Since intention and will are essential to every act; and intention, will, and malice to every crime; the absence of either intention or will will prevent any occurrence from being an action, and the absence of malice, in its general or specific form, as the case may be, will prevent any action from being a crime. This absence may be inferred, not only from the particular circumstances of the case, but from certain general considerations. In every instance, however, the question is the same, namely, whether or not the elements necessary to constitute crime did, or did not, meet together on the particular occasion in question.

The question of responsibility (which means nothing more than liability to punishment) is often treated as if certain definite classes of persons—infants, married women, or lunatics—were as such irresponsible. In truth, it is always a question of fact, did the person in question do the

forbidden act wilfully and maliciously? The infancy, coverture, or madness, are no more than evidence—capable, in most cases, of being rebutted—to show that the matter done was either not wilful, not intentional (in the widest sense of the word), or not malicious.

This appears to be the general result of the authorities upon the subject, though with respect to the cases of infants and married women the proposition requires limitations which it is unnecessary to enter upon here.

As a matter of principle, there can be no doubt that in every case it ought to be a question for the jury, whether or no the woman has, in fact, acted under her husband's compulsion, and whether or no the child had, in fact, a sufficient degree of reason to understand its own act, and to combine intention, will, and malice. The fact that the husband was present is, by the law as it stands, conclusive evidence in certain cases against the free agency of the wife. The fact that the child is under seven is conclusive evidence against its capacity. The first rule often works gross injustice. The second is nugatory. No jury would ever convict a child under seven.

The only case which presents any real difficulty, or requires any detailed examination, is that of madness. Great discussion has arisen respecting it, and the improvement of medical science has both thrown much light upon the subject and shown the existence of new difficulties which were formerly unsuspected. The great interest of the subject will, I hope, justify a somewhat minute investigation of the relation of madness to the criminal law.

A crime being an act punished by the law as voluntary, intentional, and malicious, and the act being admitted, or proved, the only way in which criminality can be disproved is by rebutting the ordinary presumptions of will, intention, or malice. If either of these presumptions is rebutted, crime is disproved. How is either of these three propositions affected by proof that an accused person is mad? This depends upon the answer to the questions, what is meant by sanity, and what by madness? They cannot be answered completely, but an approach to answers sufficiently exact for practical purposes may readily be made.

There are some settled points relating to human conduct which admit of no doubt at all, and which are assumed as the basis,

not only of the administration of justice, but of the transaction of all human affairs. One of these points is, that there is a normal state in which all human creatures act on the same principles, and that the infinite variety of conduct which they display in that state arises from the different manner in which these principles are applied to facts, and in which the facts themselves are apprehended. All men, for example, shun pain; but some men are much, and others hardly at all, affected by the prospect of future pain. Moreover, experience proves that persons in this normal state may be presumed to possess a certain degree of knowledge by which their conduct is affected. For example, it may be presumed that every one is acquainted with the meaning of common words, and with certain familiar propositions in which they are employed. Thus the administration of justice rests on the principle that every one knows the law and fears its punishments. No one makes laws for cattle. The general meaning of sanity is, that the person of whom it is predicated conducts himself in this normal manner, that he is acquainted with the circumstances by which he is surrounded, that he has objects in view in his

actions, and that he regulates his conduct with reference to them and to the general considerations which affect matters of that class.

Several important consequences flow from this view of sanity. In the first place, it is to be observed that it is a state neither of the mind, nor of the body, but of the conduct. The questions whether there is any, and what difference, between the mind and the body; how they are connected; and what is the boundary between them; form the provinces of physiology and psychology. They are foreign to law. Whether the soul and the body are two distinct things mysteriously connected; whether the soul is a mere function of the body; whether the body is a collection of impressions on the mind; are important problems: but the affirmative or negative of any one of them, or of some totally different proposition on the subject, might be true, without affecting in the smallest degree the administration of criminal justice, or the relation of madness to responsibility; for, whatever may be the truth upon this subject, it will always be equally possible to say whether in a given instance the conduct of a given person does or does not

generically resemble the conduct of the bulk of mankind.

From this follows an inference which vitally affects the whole subject of the present inquiry, and will be found, on examination, to solve most of the difficulties which are raised about it. It is that lawyers and physicians mean two different things by the word "madness." A lawyer means conduct of a certain character. A physician means a certain disease, one of the effects of which is to produce such conduct. If the pathological character of madness could be accurately ascertained, the difference would be perfectly clear. Suppose, for example, it were shown to consist in obscure inflammation of the brain. It would obviously be monstrous to set aside a perfectly reasonable will, made with every circumstance of deliberation and reflection, because, after the testator's death, it was proved, by dissection, that at the time of executing the will, he had obscure inflammation of the brain; yet this would be demonstrative proof that in the medical sense of the word he was mad.

In the next place, it must be observed that the resemblance to the conduct of other men required to constitute sane behaviour is generic and not specific, or

if the terms are preferred, not substantial, but formal. Any degree of ignorance, vice, or folly, is perfectly consistent with it. A man murders his father, robs him of 5s., and conceals his crime so clumsily as to insure his own detection. In what sense is this conduct sane? It is sane because there is an object proposed founded on an ordinary motive—the desire of gain—the rational adaptation of means to end, marks of intelligence as to the nature of life and death, and the opportunity which a man's death affords of taking his goods, together with knowledge that a murder requires concealment to avoid punishment. It is an act of which the most intelligent animal, a dog, or an elephant, would be incapable. *

The consideration that sanity of behaviour depends on a generic resemblance to the conduct of other men, solves some difficulties which are often raised on the question of motive. It is constantly said, both by judges and by counsel, that the proof, or absence of proof of motive, is an unimportant matter in a criminal trial, because the motives of men are so various as to defy calculation. This is true; but it does not follow that the question whether the act was done without

any such motive as acts on the bulk of mankind, is immaterial or insoluble. There are motives for all acts, even the maddest, and it is frequently impossible to assign them specifically; but it is generally possible to form an opinion whether a given act was done from some unknown mad motive, or from some unknown sane motive. Two men who have always lived on apparently affectionate terms with their wives, kill them. One does so by poison, secretly procured and administered. The other, without provocation or warning, starts up at a dinner-table, in the presence of twenty people, and stabs his wife. The motives of each are, and may remain for ever, absolutely unknown; but the circumstances of the two cases are *prima facie* evidence (liable, of course, to be enforced or rebutted by other circumstances) that the one man had some common unknown motive—such as ill-will, jealousy, or the like, and that the other acted in consequence of some motive supplied by disease, such as a sudden insane impulse, the existence of which, if believed by the jury, would have an important bearing on the guilt of the prisoner.

Such being the general nature of sanity and madness, how does

the existence of either affect the three propositions that a given act was intentional, that it was wilful, and that it was malicious, or either of them; and how is the fact of its existence to be proved?

The sanity of a man's conduct involves the presence of intention and will on all ordinary occasions, for the reasons already explained; and if the action belongs to one of the classes of actions which the law forbids, the law presumes it to be malicious or wicked. The general effect of this presumption I have already described; but it may be asked, how proof that a man is mad ever tends to rebut it? Suppose, it may be said, a man does not behave himself like other people; how does that affect the character of his actions? The law says it is wicked to set fire to a house. How does the madness of a man who has done so affect this affirmation? It may be a wicked act, though he may not have known it, or could not have helped it. In order to answer this question, it is necessary to enter into the matter more fully. What, then, is the precise meaning of the proposition that an act is wicked? It is, that it is condemned by some system of morality which the person using the word "wicked" affirms

to be true. For example, a man who said, "I think it wicked for first cousins to marry," would mean, I affirm a certain system of morals to be true, which system condemns such marriages, it might be on the ground of utility, or it might be on the ground of an express divine prohibition.

Does, then, the law affirm any, and if so what, system of morals to be true? The law makes no such affirmation. It has nothing whatever to do with truth. It is an exclusively practical system, invented and maintained for the purposes of an actually existing state of society. But though the law is entirely independent of all moral speculation, and though the judges who administer it are and ought to be deaf to all arguments drawn from such a source, it constantly refers to, and for particular purposes notices, the moral sentiments which, as a matter of fact, are generally entertained in the nation in which it is established. Thus the rule as to privileged communications in cases of libel, recognises "moral and social duties of imperfect obligation," as having the legal effect of justifying communications which might otherwise be actionable, and perhaps indictable.* The greater part of the

law of contracts is an amplification of moral rules about justice and good faith, which have never been invested with authority by direct legislation. The Court of Queen's Bench has claimed the powers of a *custos morum*, and punishes many acts on the ground that they are outrages on the established morality of the nation. This is the only ground on which the punishment of blasphemy, or the administration of the law relating to libel and conspiracy, can be understood.

It thus appears that the system of morality tacitly referred to by the use of the word "malice," is that system, or rather the aggregate of those moral sentiments, which, as a fact, are generally entertained in the nation. Of all sentiments relating to morality, the most general, both in its application and in its existence, is, that those acts only are condemned by morality which are done by a person who knows that they are so condemned, and has the power of abstaining from them. The fact that a man does know that they are condemned is generally inferred from his possession of the ordinary means of knowledge, which are such mental power, composure, and information as are necessary to enable him to understand the

Harrison v. Bush, 5 Ell. and Bl. 344.

meaning of common propositions, and the immediate and ordinary consequences of actions. The fact that he has the power of abstaining is inferred from the fact that he acts like other people, and can be rebutted only by proof that he does not.

All this may be summed up in the two ordinary phrases—that the presumption of malice is rebutted by proof that the person who did the act could not know that it was wrong, or could not help doing it. It is most improbable that any jury should ever be misled by the simple question, Did he know it was wrong? Could he help it? But when the matter is searched into, questions may be raised which require the foregoing explanations.

These principles clearly define the questions which can arise on criminal trials in relation to the sanity or madness of the prisoner. The question to be tried is, whether the prisoner acted with intention, will, and malice. In popular language, Was it his act? Could he help it? Did he know it was wrong? The general presumption of law is in favour of the affirmative of each of these propositions. The proof of the negative is generally sustained by evidence to show either that the prisoner's conduct on the

particular occasion in question was mad, or that he had a disease which raised the presumption that it was so. When evidence on each head is produced, the task of the jury is generally easy; and such cases constantly occur. A woman consulted a doctor as to pains in her head, loss of appetite, and low spirits, shortly after her confinement. She suffered from religious despondency, got up in the night, and drowned four of her children in the cistern; she admitted the fact, but said that a dark figure appeared to her and said God had ordered her to do so, as it was better for the children to die young than to grow up to be wicked. They had been using bad language just before.* Here there could be no difficulty in deciding that the prisoner did not know that the act was wrong, because bodily disease, of which there was independent evidence, had introduced delusions into her mind, by which her power of understanding the character of her conduct was destroyed.

Where evidence on one head only is produced, questions of the utmost delicacy arise; but the difficulty is for the jury, not for the judge. The principle

* *R. v. Wilson*, Lincoln Summer Assizes, 1861.

of law is perfectly plain, but the conflict of evidence both may, and constantly does, make a decision very difficult. In illustration of this, I will make some observations on the forms of eccentric conduct or madness generally given in evidence to disprove the presumption that a particular act was intentional, wilful, or malicious. The most important of these are generally described as partial insanity; monomania, or delusion; impulsive insanity, which is sometimes subdivided into particular species, such as *phonomania* or murder-madness, *kleptomania* or theft-madness, and *pyromania* or arson-madness; and moral insanity. The cases of total insanity and idiocy call for no remark.

The most important of these is what Lord Hale describes as partial insanity. It has also been called monomania; and it appears to me not to differ for legal purposes from the existence of insane delusions on particular subjects, which leave the thoughts unaffected on other subjects. How does the existence of such a disease affect the criminality of a given act? It may do so in two ways. In the first place, it may be evidence to disprove the presence of the kind of malice required by the law to constitute

the particular crime of which the prisoner is accused. A man is tried for wounding with intent to murder. It is proved that he inflicted the wound under a delusion that he was breaking a jar. The intent to murder is disproved, and the prisoner must be acquitted; but if he would have had no right to break the supposed jar, he might be convicted of an unlawful and malicious wounding. Wrongfully to break a jar is a malicious act; and if a man wounds another in so doing, he wounds him unlawfully and maliciously. In other words, the delusion must for the purposes of the trial be taken to be true.

This, however, is a rare and comparatively unimportant application of the existence of partial insanity or insane delusion. Its great importance is, that it is evidence to show that the prisoner's mind was so disturbed that he did not know that the act was wrong, that he could not form a reasonable judgment on it. The application of this evidence to particular facts is a matter of the greatest nicety.

Illustrations show this better than generalities. A professional highway robber shoots a man and robs him, buries the body in a ditch, disguises and hides himself,

and flies from justice. It is proved that he had an insane delusion, that his little finger had five joints in it. If the evidence stopped there, it would afford as little excuse as if he had mistaken his victim's name, yet it would prove a clear case of the co-existence of insane delusion and criminal responsibility. The concealment and flight would be strong evidence to shew that he knew the act was wrong. If he waited to commit the murder till no one was by, it would be strong evidence that he could have helped doing it at all; besides, the course of the man's life, which could probably be given in evidence on such an occasion, would go far to show that the act was sane and malicious. Circumstances, however, might exist, which would convert the delusion specified into strong evidence against malice. Suppose it came on after some violent disease, and was accompanied by great extravagance of conduct, and by other circumstances tending to shew that the person accused had committed the acts in question not with any knowledge of their character, but because before he went mad he had led a life of crime and was thus led to violence and plunder by old associations; this would be strong evidence

against the existence of malice. By supposing new facts on the one side or the other any degree of difficulty may be introduced into the decision of particular cases, though the question to be decided remains unaltered. In illustration of this I have given at the end of the volume a full account of the famous case of William Dove, tried at York in 1856.

The consideration of delusions affords an answer to a plausible theory sometimes put forward as to the law upon this subject. It is sometimes said that the knowledge required to constitute malice is not a knowledge that a given act is wrong, but a knowledge that it is illegal. If this were true, it would set the law in opposition to those moral sentiments on which it ought to be founded, for the sake of obtaining a degree of precision not really greater than that which it possesses at present. The following case shows this. Hadfield is said to have shot at George III. under the delusion that he (Hadfield) was the Saviour of the world, and that it was necessary that he should be put to death for the salvation of mankind. To have put himself to death would according to his view have been a crime. He therefore did an

act for which he expected to be put to death by others. If this account of his delusion is true, as it may be, Hadfield not only knew that his act was illegal, but that knowledge was the cause of his act. Yet surely such an act ought not to be punished, and the law, as explained above, gives the reason, namely, that Hadfield's mind was in such a strange condition that he was not in a position to form any reasonable judgment on his proposed act, and therefore could not know that it was wrong, though he did know that it was illegal.

It should be observed in conclusion that the importance of isolated delusions, as disproving a knowledge that a particular act is wrong, is not unlikely to be underrated. They act so strangely, and proceed apparently from causes so deeply seated, that it is difficult to say how they are connected with parts of the conduct apparently most remote from them. A man had an insane love for windmills, and passed his time in watching them. His friends, hoping the fancy would pass off, removed him to a place where there were no windmills. He took a child into a wood and tried to murder it, hoping, as it turned out, to be confined as a punishment in some

place where there were windmills.* This case shows that the connexion between the delusion and the act may be as mad as the delusion itself, and such cases prove that when the existence of any well-marked delusion is shown in a satisfactory manner, juries ought to require proof of express malice before they find that malice exists at all.

The case of what is called impulsive insanity is easily dealt with. It is said that on particular occasions men are seized with irrational and irresistible impulses to kill, to steal, or to burn, and that under the influence of such impulses they sometimes commit acts which would otherwise be most atrocious crimes. Many instances of the kind are collected in medical books. It would be absurd to deny the possibility that such impulses may occur, or the fact that they have occurred, and have been acted on. Instances are also given in which the impulse was felt and was resisted. The only question which the existence of such impulses can raise in the administration of criminal justice is, whether the particular impulse in question was irresistible as well as unresisted. If it were irresistible, the

* Taylor, Med. Jur. 921. See other instances of the same kind there collected.

person accused is entitled to be acquitted, because the act was not voluntary and was not properly his act. If the impulse was resistible, the fact that it proceeded from disease is no excuse at all. If a man's nerves were so irritated by a baby's crying that he instantly killed it, his act would be murder. It would not be less murder if the same irritation and the corresponding desire were produced by some internal disease. The great object of the criminal law is to induce people to control their impulses, and there is no reason why, if they can, they should not control insane impulses as well as sane ones.

The proof that an impulse was irresistible depends principally on the circumstances of the particular case. The commonest, and probably the strongest cases, are those of women who, without motive or concealment, kill their children after recovery from childbed.

Moral insanity is said, by those who use the phrase, to consist in a specific inability to understand or act upon the distinction between right and wrong, a sort of moral colour-blindness, by which persons, sane in all other respects, are prevented from acting with reference to established moral distinctions. Whe-

ther such a disease exists, and whether particular people are affected by it, are of course questions of fact like any others. No doubt if its existence in a particular case were proved, it would be a ground for acquitting the prisoner, as it would disprove malice. So it might be a good defence to admit that a man meant to murder another; that he had loaded a pistol to shoot him, and pointed it at his head; but to contend that it was fired by a sudden involuntary convulsion of the necessary muscles, and not by the prisoner's will. The difficulty is to get the jury to believe it. The evidence given in support of the assertion that a man is "morally insane" is, generally speaking, at least as consistent with the theory that he was a great fool and a great rogue, as with the theory that he was the subject of a special disease, the existence of which is doubtful.

The state of the law above described has often been blamed. Some persons have complained of its laxity, others, and this has been the more frequent complaint, of its cruelty. It appears to me to be perfectly reasonable. To punish men for acts which they either could not help or could not know to be wrong would not really increase the deterring

power of punishment. It would only deprive it of all the support which it derives from the moral sentiments of the public. On the other hand, to make madness a plea in bar of all further proceedings, so that every one affected with that disease in any degree whatever might commit any crime he pleased upon his neighbours, his keepers, or his companions in a madhouse, would be dangerous in the extreme. Madmen in the present day are treated with a degree of humanity and entrusted with an amount of freedom which were formerly quite unknown. It would be impossible to allow this to go on if they were deprived of the protection of the law by being freed from all responsibility to it. Hanwell and Colney Hatch contain thousands of inmates who associate together freely, enjoy many amusements in common, cultivate considerable pieces of land, and, subject to some necessary restrictions, live much like sane people. Suppose they all knew that any one of them might murder, ravish, or mutilate any other without the fear of punishment, the result would be that their liberty would have to be greatly restrained, and that they would have to be treated on the footing, not of moral agents

to be governed by law, but of animals to be governed by force.

The law as it stands allows to every symptom of madness its full weight as evidence that the act done was not a crime. if, notwithstanding the madness of the accused, he did commit a crime, it is impossible to suggest any reason why he should not be punished for it. The state of his mind might no doubt form a ground for a recommendation to mercy, but that is a question of discretion. It affords no reason why the case should be withdrawn from authorities by whom that discretion is exercised, as their least favourable critics must admit, with almost excessive humanity.* *Vide* General View of the Criminal Law of England, by J. F. Stephen (Chap. I and III.

* The great authority as to the law on the subject of madness and criminal responsibility is to be found in the answers of the judges to the questions addressed to them by the House of Lords in consequence of the acquittal of M'Naghten, for the murder of Mr. Drummond in 1843. 1 Car. and Kir. 134. The text is little more than an expansion of the principles stated in those answers. The following authorities may also be consulted on this subject:—1 Hale, Pleas of the Crown, ch. iv. *R. v. Arnold*, 16 St. Tr. 764. *R. v. Lord Ferrers*, 19 St. Tr. 886. *R. v. Sir A. Kinloch*, 28 St. Tr. 891. *R. v. Hadfield*, 27 St. Tr. 1282. *R. v. Oxford*, 9 C. and P. 547. *R. v. M'Naghten*—published separately as a pamphlet—see also 1 Townsend's St. Tr. 314. For medical views of the question see Dr. Forbes Winslow's *Lettsomian Lectures*; Dr. Prichard's *Medical Jurisprudence of insanity*; Dr. Ray's work on the same subject; and Taylor's *Medical Jurisprudence*, ch. lxxvii.

CALCUTTA HIGH COURT.

FULL BENCH.

The 9th December, 1873.

The Hon'ble Sir Richard Couch,
Kt., Chief Justice, and the Hon'ble
 F.B. Kemp, Louis S. Jackson, F. A.
 Glover, and C. Pontifex, *Judges*.

SIAM CHAND KOONDoo and others
(Plaintiffs) Appellants,

versus

BROJONATH PAL CHOWDRY & others
(Defendants) Respondents.

Sale of Tenure for Arrears of Rent
—Act X. of 1859 Secs. 105 and
106—Meaning of the word
'Tenure.'

A Zemindar who has obtained a decree for arrears of rent of a transferable tenure is entitled to sell the tenure : and a person who has obtained a transfer of such tenure which he has not registered, and cannot show a sufficient cause for not registering it, is bound by the sale and cannot set up a title which he has acquired by a previous sale.

By 'tenure' is meant, not the right or interest of any person in the land, but the holding or the interest which has been created by the lease ; and giving to the word its plain and ordinary meaning, it is that which is to be sold. The rent is not regarded as due from the person against whom the decree is obtained, but as due in respect of the tenure.

This case was referred to the Full Bench on the 24th July 1873 by Jackson and Birch, J.J., with the following remarks :—

JACKSON, J.—We think the point involved in this case should be referred to a Full Bench for decision, and the point to be referred should be this—The plaintiffs purchased

on the 19th February 1866 the right, title, and interest of Brojonath Pal and others in a certain jote which, it is admitted, is a transferable under-tenure. That sale was not confirmed, and therefore did not become absolute and final, until the 23rd June. Intermediately, the zemindar brought a suit against the jotedars whose rights had been sold for arrears of rent, and having recovered a decree against them, caused the tenure to be put up to sale ; and it was sold accordingly on the 4th June, that is to say, 19 days before the confirmation of the sale to the plaintiffs. The purchaser was one Kedar Nath, who afterwards conveyed his rights to Menoka Dossee, one of the defendants. The transfer under the circumstance was not registered ; neither did the plaintiffs make any deposit of the rent due as allowed by Section 6 of Act VIII. of 1865 (B. C.) Are the plaintiffs entitled to possession of the jote notwithstanding the sale of it in the rent suit ?

The cases which have been referred to, and from which the conflict arises, are on the side of the plaintiffs,—

X., Weekly Reporter, pp. 434, 446.

XIII., Weekly Reporter, p. 449.

III., B. L. Reports, p. 49, App. Civil.

XV., Weekly Reporter, p. 341.

XVII., Weekly Reporter, p. 417, and also a judgment of the Judicial

Committee printed at page 195 of the same volume.

On the side of the defendants are,—

II., Weekly Reporter, p. 131.

V., Weekly Reporter, p. 205.

VI., Weekly Reporter, p. 59, a ruling by the Full Bench, which, however, does not appear to bear distinctly on the point.

Sutherland's Reports for 1864, page 48, Act X. Rulings.

XV., Weekly Reporter, p. 99.

XVII., Weekly Reporter, p. 352, and finally a quite recent judgment of the present learned Chief Justice and Mr. Justice Glover in Special Appeal No. 911 of 1872.*

The judgments of the Full Bench were delivered as follows by—

COUCH, C. J.—The decision of the present question depends in my opinion upon the construction which is to be put upon Sections 105 and 106 of Act X. of 1859. These Sections, I think, must be read together, forming as they do a provision for the sale of transferable tenures in execution of decrees for arrears of rent.

Section 105 says that if there is a decree for arrears of rent due in respect of an under-tenure which by the title-deeds, or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale in execu-

tion of the decree, according to the rules for the sale of under-tenures, for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force.

By 'tenure' is meant, not the right or interest of any person in the land, but the holding or the interest which has been created by the lease; and giving to the word its plain and ordinary meaning, it is that which is to be sold. If this had not been intended, and the person who obtained a decree for rent was to be only entitled to sell the right and interest of the person against whom the decree was obtained, it would not have been necessary to make the provision in this Section, as the decree might be executed upon all his property in the same manner as any other decree. It seems to be that by providing that the tenure shall be sold, more was meant than selling what is the property of the person against whom the decree had been obtained. And the words "according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof," may assist us in coming to this conclusion. The rent is not regarded as due from the person against whom the decree is obtained, but as due in respect of the tenure.

The words in the latter part of the Section "other property," do not appear to me to limit the meaning of the first part. In many, if not in most cases, the tenure would

* 20, W. R., 59.

be the property of the person against whom the decree is obtained ; and then the words " other property moveable or immoveable " belonging to the judgment-debtor, would not be inappropriate. I think it would be giving too great an effect to the words " other property," to say that they show that the intention of the Legislature was, not that the whole of the tenure should be sold, but only the right and interest of the judgment-debtor in it. When we compare the words of Act X. with those of the Regulation which was repealed by it, and for which the provisions in Act X. were substituted, it seems that some alteration of the law was intended. Act X. professes to be an Act to amend the law, and not merely a consolidating Act. Many provisions in the Regulation are repealed, and others are substituted for them. The part of the 7th Clause of Section 15 of Regulation VII. of 1799 which would be applicable to the present question says,—" If the defaulter be a dependent talookdar, or the holder of any other tenure which by the title-deeds, or established usage of the country, is transferable by sale or otherwise, it may be brought to sale by application to the Dewanny Adawlut, in satisfaction of the arrear of rent." This authorizes the sale where the defaulter, the person against whom a decree might be obtained, is the holder of the tenure. The Judicial Committee of the Privy Council in the case in XVII. Weekly Reporter

allude to these words, and consider that they are very material as to what cases were within the Regulation. They say (page 200)— " They were not the holders of any tenure, to use the words of Regulation VII. of 1799, and were certainly not proprietors, in the words of the Regulation VII. of 1819." In Act X., words which are capable of a much wider meaning are substituted for the words of the Regulation. The Act says generally that if there is a decree for arrears of rent the tenure may be sold. There are no words limiting it to a decree obtained against the person who is at the time the holder of the tenure.

There is another difference between the Act and the Regulation which shows that it was the intention of the Legislature to give to the zemindars a more effectual remedy than they possessed before. The 8th Clause of Section 15 of the Regulation directs that transfers shall be registered :—" As a further security to the zemindars in maintaining their rights over the dependent talookdars continued under them, the latter are hereby required to register in the sudder cutcherry of the zemindaree to which their talooks may be attached, all transfers of such talooks, or portions of them, by sale, gift, or otherwise, as well as all successions thereto, and divisions among heirs in cases of inheritance." But it does not provide, as Act X. does in the proviso to Section 106, that no transfer which

is required to be registered shall be recognized, unless it has been so registered, or unless sufficient cause for non-registration be shown to the satisfaction of the Collector. More stringent provisions in favor of zemindars are inserted in Act X. of 1859 than in the Regulation. It appears to me, taking Sections 105 and 106 together with the proviso, that it was intended that the zemindar should be at liberty to treat as the holder of the tenure, and the person whom he might sue for the arrears of rent, the person who is registered in his books as the owner, unless any one could show that there had been a transfer, and that there was sufficient cause for its non-registration. In such a case, a zemindar might find that he had been suing the wrong person. Taking these Sections together, I think that the zemindar, having obtained a decree for arrears of rent, is entitled to sell the tenure; and that the person who has obtained a transfer which he has not registered, and cannot show a sufficient cause for not registering it, is bound by the sale, and cannot set up a title which he has acquired by a previous sale.

Section 106 appears to provide for cases where the zemindar has sued the wrong person. The real proprietor may come in upon the condition of depositing the amount of the decree, and may show that he was the owner of the tenure, and should have been sued. That

is a wholesome provision; for a suit might be brought collusively and a decree for the arrears of rent might be obtained, and the tenure be sold without the real proprietor being able to show that in fact the arrears claimed were not due.

The opinion that I now state, and which I stated in a former case when I sat with Mr. Justice Glover, is in accordance with the earlier decisions of this Court. And in the conflict of opinion which there is amongst the learned Judges of this Court, it is satisfactory for me to find that in the earlier cases the same was decided as I now propose that we should decide.

In the case in the VII., Weekly Reporter, which is a Full Bench Ruling, the late learned Chief Justice, no doubt, appears to have expressed an opinion contrary to this; but it does not seem to me that the decision there was upon the question which is now before us. The cases in this Court in which the question had been decided were not referred to in that case, and were not in any way the ground of the reference to the Full Bench. From this I conclude that it was not then intended to refer the present question. What was referred was the question as to incumbrances, although, no doubt, the Chief Justice expressed an opinion on the question now before us. On the other hand, in the VI. Weekly Reporter, page 54, which was also a Full Bench case, Sir Barne

Peacock appears, so far as we can gather from his language, to have been of the same opinion as myself. Under those circumstances, it seems to me that we are not bound by the decision of the Full Bench in the VII., Weekly Reporter, and I think the question now comes properly before this Full Bench to determine it independently of any previous decision of this Court. Looking at it as a question under the Act, I think the answer ought to be that the sale under the Act did confer a complete title upon the purchaser.

KEMP, J.—I concur.

JACKSON, J.—I am of the same opinion with the learned Chief Justice. I also think that we are not concluded by the judgment of the Full Bench in the case in VII., Weekly Reporter. The decision of the Full Bench on that occasion appears rather to have been a decision upon a nearly similar point on a different ground than a decision upon the question now before us. If it were otherwise, no doubt under the rules for references to the Full Bench, we should probably have to govern ourselves by that decision. The simplest and only safe mode of deciding the question before us appears to be upon the construction of Sections 105 and 106 of Act X. of 1859, taking those Sections along with the other Sections of the Act. The modes of executing decrees passed under Act X. were originally pointed out in the Sections commencing with Sec-

tion 86 of that Act. The 86th Section has been repealed, and is replaced by Section 17 of Act VI. of 1862 (B. C.) That Section declares generally what the procedure open to a decree-holder is, in these words:—"Process of execution in any suit hereafter to be instituted under this Act, or under Act X. of 1859, may be issued against either the person or the property of a judgment-debtor, but process shall not be issued simultaneously against both person and property."

Then in some of the subsequent Sections particular remedies or modes of procedure are indicated in particular cases. Accordingly, Section 105 enacts—"If the decree be for an arrear of rent in respect of an under-tenure, which by the title-deeds, or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure," &c. There is a limitation of that in Section 108, where the person who has obtained the decree is a sharer in a joint undivided estate; otherwise, subject to the claim to be made under Section 106, the decree-holder might apply for sale and the Court might proceed to sell the under-tenure. That procedure is quite separate from the course to be taken in respect of other immoveable property in respect of which I conclude the Court would sell the right, title, and interest of the judgment-debtor; but

under Sections 105 and 106 the tenure itself, I take it, is the thing to be sold. It is to be observed that the position of a claimant under Section 106, and what the claimant has to do, are quite distinct from those of a claimant under the other Sections of the Act. A claimant under Section 106 is to allege that he is the proprietor of the under-tenure and was in lawful possession of it, and has to deposit in Court the amount of the decree. That is provided in respect of claimants with regard to under-tenures; and taking all the provisions of these two Sections together, it seems to me clear that the Legislature contemplated a separate procedure, and intended that the Court should go on to the sale of the under-tenure itself. I concur, therefore, in thinking that the under-tenure in this case was liable to be sold, and that the plaintiff could not by reason of his intermediate purchase at a sale in execution of a decree of the Civil Court recover the under-tenure from the party who had purchased it at a sale under Act X.

GLOVER, J.—I concur with the learned Chief Justice.

PONTIFEX, J.—I agree with the learned Chief Justice.

COUCH, C. J.—The special appeal will be dismissed with costs.

CALCUTTA HIGH COURT.

FULL BENCH.

The 22nd April, 1874.

The Hon'ble Sir Richard Couch, *Kt.*, Chief Justice, and the Hon'ble L. S. Jackson, J. B. Phear, W. Ainslie, and G. G. Morris, *Judges*.
NURENDRO NARAIN ROY (*Plaintiff*).

*Appellant,**vs.*

ISHAN CHUNDER SEN (*Defendant*)
Respondent.

*Right of Occupancy—Transfer—Ejectment—Act VIII. (B. C.) of 1869 Section 6.**

A right of occupancy which a ryot has under Act VIII. (B. C.) of 1869 Sec. 6 is not transferable.

When such ryot sells his holding, his right of occupancy ceases, and it cannot protect the purchaser against ejectment.

This case was referred to the Full Bench by Markby and Birch, J. J., with the following remarks:—

MARKBY, J.—In this case it appears that on the 31st March 1838 the zemindar granted to one Kristo Chunder Doss a pottah of 301 beegahs of bunjor waste land at a yearly rent of Sa. Rs. 18-13, to hold the same by raising bunds and excavating tanks in, and by cultivating, the said land himself, or by means of tenants from generation to generation as a moku-ruree tenure: and there was a stipulation that the rate of rent should never be changed.

Kristo Chunder held under the

* Sec. 6, Act X. of 1859.

pottah until the 5th December 1859, when the defendant purchased and got into possession and was accepted by the zemindar as his tenant under the pottah in the place of Kristo Doss.

On the 6th May 1871, the zemindaree was sold for arrears of Government revenue and purchased by the plaintiff, and on the 22nd September 1871 the plaintiff delivered to the defendant a notice to quit.

Several objections were taken by the defendant which have been found to be untenable; the only substantial question being that which we reserved for consideration, namely, whether the defendant is protected from being turned out by the proviso of Section 37 of Act XI. of 1859; in other words, whether he is a "ryot having a right of occupancy." If he is, although his rent may be enhanced according to law, he cannot be ejected.

This question was raised in the Lower Court by the fifth issue in a somewhat inaccurate form, and we cannot say that either the evidence or the finding of the Subordinate Judge is quite as clear and as full as it might be; but upon the whole we think we may take it as established that the land, when the pottah was originally granted, was waste land without any tenant upon it; that Kristo Chunder entered upon the occupation himself; and that he brought a portion

of the land into cultivation himself, and prepared the way for cultivating the remainder by excavating a large tank and bringing tenants on to the land, by whom a further portion of the land was brought into cultivation. About two-thirds of the land appears to be now under cultivation, and all, or very nearly all, of this is held by tenants under the defendant. The tenants appear to hold what are called bhag-jotes, that is to say, the defendant is entitled to a share in the produce.

Under these circumstances, we think that the tenure of Kristo Doss was in its inception a ryottee tenure. It was certainly not the tenure of what has been called a middleman, for he was the immediate occupier of the soil. Nor could it, in our opinion, be rightly called the tenure of a talookdar. The pottah confers no privileges upon the grantee other than those of an ordinary ryot, and contemplates that the grantee will bring the land into cultivation by his own personal exertions, as was actually the case. We therefore think that Kristo Doss was a ryot, and continued to be so down to the time when he sold his tenure to the defendant.

It seems to us also that the defendant is a ryot; he succeeded to a ryot, and there was nothing to change his status: if, therefore, he acquired a right of occupancy from Kristo Chunder, he is within

the protection of the Section. He had only been in occupation eleven years nine months and seventeen days when the notice was served upon him ; he had, therefore, gained no right of occupancy himself, and there are many decisions of this Court that the possession of the transferee cannot be added to the possession of the transferor. The last of these decisions is in the XVII., W. R., 179, and the only decision to the contrary (V., W. R., Act X., 55) must, we think, be considered to be overruled.

The questions to be decided are therefore reduced to these two :— (1) whether the right of occupancy which Kristo Doss had at the time of the sale to the defendant was transferred to the defendant? and (2) whether, if it was not so transferred, is it still in existence in Kristo Doss or his heirs, and being in existence, will it prevent the plaintiff from ejecting the defendant?

The first of these questions has been not unfrequently said to have been decided by a Full Bench in a case reported in VII., W. R., 528, and if that had been the case this reference would have been unnecessary. But this case decides a totally different point, as may be seen by considering the circumstances out of which it arose. The defendant held a non-transferable tenure, and he had held it for more than twelve years. He then attempted to transfer it, but the zemindar

refused to recognize the transfer and sued him for his rent. The argument for the defendant was that because he had gained a right of occupancy, therefore that which was a non-transferable tenure had become a transferable one, and that therefore his liability ceased. The question was not referred because there were any conflicting decisions upon the point, but because of its importance, and as pointed out by the Full Bench, no cases had ever gone to this extent. No argument appears to us necessary to show that this decision has no bearing upon the subject now under consideration.

Of the other cases, the following have been relied upon in favor of the transferability of the tenure :—I., W. R., 86 ; *Id.*, 826 ; IV., W. R., Act X., 2 ; and XI., W. R., 405. The following have been relied on for the opposite view :—IX., W. R., 522 ; XI., W. R., 162 ; XV., W. R., 152 ; and XVII., W. R., 179. It is not easy in all these cases to be quite sure of the grounds on which they proceed, but it is not, we think, possible to reconcile all.

Besides these cases it may be convenient to refer to cases in which it has been held that the ryot by sub-letting his land does not determine his right of occupancy, IX., W. R., 344 ; X., W. R., 113 ; and XII., W. R., 111.

There is also a case in which it has been held that if a ryot having a right of occupancy transfer his

right to another, the right of occupancy is not thereby forfeited, and the zemindar cannot turn the grantee out of possession,—XI., W. R., 94.

It is this last case which renders the second of the above questions necessary. There is, it is true, no other decision upon this very point, but it appears to us that the two questions are so closely connected as to make it desirable that both should be considered together. The two questions referred are, therefore, those above stated.

The judgments of the Full Bench were delivered as follows by—

COUCH, C. J. (AINSLIE, J., *concurring*)—In the judgment by which this case is referred to us, it is found that Kristo Doss was a ryot, and he continued to be so down to the time when he sold his tenure to the defendant. The way in which the case comes before us does not allow us to consider whether Kristo Doss really was a ryot or not. We must take the fact as found by the two learned Judges. I wish to prevent its being assumed that upon the facts which appear in this case I should have found that he was a ryot.

The first question put to us is, whether the right of occupancy which Kristo Doss had at the time of the sale to the defendant was transferred to him.

This is a question which must be considered and answered indepen-

dently of any custom. In answering it I wish particularly to be understood as not giving any opinion respecting rights of occupancy where there is a custom to transfer them. In these cases the landlord or zemindar may be supposed to have allowed the ryot to occupy according to the custom. If the ryot has by custom a right to transfer, the landlord may be supposed to have assented to the right of occupation which he gave to the ryot being transferred by him. There may be many cases in which a ryot may have a right by custom to transfer. We must exclude all these from consideration in answering this question.

In my opinion it is to be answered solely with reference to the words of Section 6 of Act VIII. (B. C.) of 1869, by which the right is given, not for the first time, but on which it now depends. And whether, when Act X. of 1859 was passed, this was the creation of a new right in a ryot, or the recognition by the Legislature of an existing custom to allow the ryot to continue to hold, does not make any difference in the construction of the Act. If the Act creates a new right, we must look at the words of it for what the right is; and if it recognizes a custom, it recognizes it only to the extent expressed, and the result is the same.

The words of the Section are that every ryot who shall have cultivated or held land for a period

of twelve years shall have a right of occupancy in the land so cultivated or held by him, whether it be held under a pottah or not, so long as he pays the rent payable on account of the same; but this rule does not apply to *khamar neejjote*, or *seer* land belonging to the proprietor of the estate or tenure, and let by him on a lease for a term, or year by year, nor (as respects the actual cultivator) to lands sub-let for a term, or year by year, by a ryot having a right of occupancy. The holding of a father or other person from whom a ryot inherits shall be deemed to be the holding of a ryot within the meaning of this Section.

These words appear to me to point to a ryot having the right in land cultivated or held by him, and so long as he pays the rent, and to the right not being one which can be transferred to some other person. It is a right to be enjoyed only by the person who holds or cultivates and pays the rent, and has done so for a period of twelve years. It does not speak of his acquiring a right which he might, having acquired it, transfer or make use of as a subject of property, but it seems intended to secure to a ryot who has cultivated or held for twelve years a continuance of his cultivation or holding so long as he pays the rent. And the provision at the end of the Section, by which the holding of a father or other person from whom the ryot inherits is to be deemed

the holding of the ryot, supports this construction; for it appears to show that, except in that particular case, the holding must be entirely by the person who claims the right. This is a law which imposes a restriction upon the proprietary rights of the zemindar or landlord, and a ryot cannot claim under it anything more than the words clearly give to him. There are not here, in my opinion, words of so doubtful a meaning that we should consider whether it would be just or equitable that the ryot should have the power to transfer. The ordinary construction of the words appears to me to be that the right is only to be in the person who has occupied for twelve years, and it was not intended to give any right of property which could be transferred. I would therefore answer the first question by saying that the right which *Kristo Doss* had at the time of the sale was not transferable. The question, as I have said, is solely upon the act, and independent of the existence of any custom.

The second question is, whether if it was not transferred, is it still in existence in *Kristo Doss* or his heirs, and being in existence, will it prevent the plaintiff from ejecting the defendant? Now, if a ryot having a right of occupancy endeavours to transfer it to another person, and, in fact, quits his occupation, and ceases himself to cultivate or hold the land, it appears to me that he may be rightly considered

to have abandoned his right, and that nothing is left in him which would prevent the zemindar from recovering the possession from the person who claims under the transfer. And not only may he be considered to have abandoned it, but if the right which is given by the law is one which exists only so long as he holds or cultivates the land, when he ceases to do that by selling his supposed right and putting another in his place, his right is gone and cannot stand in the way of the landlord's recovering possession. If it were not so, the law would become nugatory. The position of things would be that the transfer by the ryot is invalid, and gives the transferee no right to the possession, but the ryot could not recover possession from the transferee as he would be bound by his act of transfer; nor could the landlord recover possession because the outstanding right in the ryot would be in his way. The result would be that, although the transfer is invalid, the transferee would be able to keep possession and to set the landlord at defiance. I think in this case it may be considered either that the ryot has abandoned his right altogether, and therefore it cannot be set up as an answer to the suit by the landlord for possession, or that his right has ceased, has been put an end to, because it existed only so long as the ryot himself continued to hold or cultivate the land.

I would, therefore, in answer to the second question, say that any supposed right which may be in existence in Kristo Doss or his heirs will not prevent the plaintiff from ejecting the defendant.

JACKSON, J.—I entirely concur in the judgment which has just been delivered, and have very few words to add. I should be inclined to describe the right, whether created or recognized by Section 6 of the Rent Act, as being a right resulting from the connection between the occupying tenant and the land which he occupies for a space of twelve years. The Act expressly declares that the holding of the father or other person from whom a ryot inherits shall be deemed to be the holding of the ryot: and there I think one may say that the well-known maxim *inclusio unius, &c.*, would apply.

As to the second question, the answer appears to me to be very clear, for by the sale out and out to another person, the ryot voluntarily terminates that connection between himself and the land which he had occupied which is necessary to the existence of the right of occupancy. The law allows a sub-letting by a ryot who has a right of occupancy, though it does not permit the growth of a right of occupancy within a right of occupancy. So long as the ryot having a right of occupancy merely sub-lets the land, he maintains that connection between himself

and the land which is essential to the existence of the right; but when he has transferred his right to another, he no longer maintains that connection.

I wish also to say that I expressly concur in the observations which the Chief Justice made at the outset of his judgment, namely, that we are dealing with this case on the facts found by the learned Judges who referred it, and by that we are limited.

There is only one other observation which I wish to make as to the case which was referred to in XX., W. R., 139. I do not apprehend that the learned Judges who decided that case meant to suggest that after a ryot having a right of occupancy had parted with his right by transfer, and the zemindar had evicted the transferee as having no right to occupy the land, the ryot might afterwards come in and insist upon the right he had voluntarily parted with as entitling him to enter upon the land. If, however, any such claim should hereafter be set up in any other case, it will doubtless have to be considered.

PHEAR, J.—I entirely concur with the Chief Justice. I understand the questions which are put to us to have reference solely to that peculiar right of occupancy which I may call the creature of Section 6 of the Rent Law, and that in the matter which is now before us we are entirely disembarassed, as the Chief

Justice has said, of all considerations which might affect or enter into questions relative to the alienation of the right to hold and occupy land founded on the element of custom, or otherwise. And it seems to me that under this hypothesis the questions which have been put to us in this reference are both immediately answered in the negative when the view is taken of Section 6, as I think it ought to be, to the effect that the right of occupancy which is the subject of this Section is rather of the nature of a personal privilege than a substantive proprietary right. I think that there can be no right of occupancy under the terms of this Section other than in a person who is cultivating or holding the land as a ryot in the situation which is mentioned in this Section; and that therefore a person can only have this right who is actually cultivating or holding the land, and then only if he has cultivated or held the land as a ryot for a period of twelve years according to the rule for estimating that time which is prescribed in the Section; and that rule is that only the actual cultivation or holding of the person who sets up the right, and in the case where he has taken the cultivation or the holding of the land by inheritance from a predecessor, then, constructively, the cultivation or holding of that predecessor, counts. The Section does not give to any one other than the person who has actually held or cultivated

land for the period of twelve years either by himself alone, or by himself and his predecessor, from whom he has taken by inheritance, together, the right of occupation which is the subject of the Section. And if this is so, then it seems to be plain upon the facts which the reference brings before us that Ishan Chunder Sen, the defendant in the case, has not a right of occupancy in the land which is the subject of suit, because he has himself only cultivated or held it as a ryot for a period of a little more than eleven years, and the person who preceded him in the cultivation or holding thereof was not one from whom he took it by inheritance. His predecessor in the cultivation or holding was Kristo Doss, from whom he took by purchase. In that state of things, he is not entitled by the words of Section 6 to add any years of Kristo Doss' holding to the years of his own holding. And certainly Kristo Doss, in the view that I have taken of the Section, can have no right of occupancy in the land, because he is not now cultivating or holding it, but, on the contrary, has long been out of the occupation of it; he has not cultivated it, he has not held it in any sense whatever during the period of the last eleven years and upwards. To use the words of the Section, he is not a person who is occupying or holding the land.

The second branch, also, of the

second question which has been referred to us, seems to be answered in the negative by the decision which is reported in XX., W. R., 129—a decision, the correctness of which has not yet been impeached, supported by the decision in Special Appeal No. 1651 of 1872.*

I concur in the judgment which has been delivered by the learned Chief Justice, and have nothing substantial to add to it. I ought, however, perhaps to remark, with regard to an observation which has been made on the case reported in XX., W. R., 139, that it was obviously not the intention of the Bench which passed that decision to say anything judicially as to whether or not the grantors or transferrors of the jote in that case still had, in the events which had happened, any right to require possession of the land at the hands of the zemindar. All that that decision decided was that whatever the rights of the transferrors as against the zemindar might be, those rights did not prevent the zemindar, under the circumstances of the case, from recovering possession of the land from a stranger.

MORRIS, J.—I concur with the Chief Justice in thinking that both the questions referred to us should be answered in the negative.

CALCUTTA HIGH COURT.

FULL BENCH.

The 4th March, 1874.

The Hon'ble Sir Richard Couch,
Kt., Chief Justice, and the Hon'ble
 L. S. Jackson, J. B. Phear, W.
 Markby, and E. G. Birch, *Judges*.

BROJO MISSER (*Appellant*)*Petitioner,*

18.

MUSSAMUT AHLADEE MISRAIN and
 others (*Respondents*) *Opposite Party*.

*Act VIII. (B. C.) of 1869, Sec. 102**—Additional Judge—Appeal.*

Held (JACKSON, J. *dissentiente*) that an
 Additional Judge comes within the meaning
 of Act VIII. (B. C.) of 1869, Section 102,
 and that an appeal does not lie from his
 decision in cases of the nature described in
 that Section any more than from that of a
 District Judge.

*This case was referred to the Full
 Bench on the 9th December 1873
 by Phear and Ainslie, J.J., with
 the following remarks:—*

PHEAR, J.—We think that this
 matter must stand over, and the
 further hearing be postponed in
 order that we may refer for the
 decision of a Full Bench the ques-
 tion whether or not an Additional
 Judge invested with the powers
 given to him by Act VI. of 1871
 is a District Judge within the
 meaning of Section 102 Act VIII
 (B. C.) of 1869.

*The judgments of the Full Bench
 were delivered as follows:—*

BIRCH, J.—The Local Legisla-
 ture has, in Section 102 of Act VIII.
 of 1869, substituted for the words

“Zillah Judge,” used in Act X. of
 1859, the term “District Judge.”
 This, in the General Clauses Act I.
 of 1868, passed by the Government
 of India, is defined to mean “the
 Judge of a principal Civil Court of
 original jurisdiction.” If these
 words are strictly interpreted, it
 may be said that there being only
 one such Court in a district it can
 refer only to the officer presiding
 in that Court, and that the bar to
 appeal contained in Section 102
 refers only to cases tried by him
 originally or in appeal. I do not
 think that such was the intention
 of the framers of the Act. In
 some of the most important dis-
 tricts, appeals under Act X. of
 1859 had been for years disposed
 of by the Additional Judges. These
 officers were appointed under Re-
 gulation VIII. of 1833, and were
 empowered to perform any part of
 the duties of the Judge of the
 Zillah, and, in performance of those
 duties, were to exercise the same
 powers as the Zillah Judges. Ap-
 peals from the orders of the
 Additional Judges lay only to the
 Sudder, and subsequently to the
 High Court. This law was in force
 when Act VIII. of 1869 was passed
 by the Bengal Council, and I find
 nothing to indicate that the Local
 Legislature had any intention (if
 it had the power) to reduce the
 status of the Additional Judges to
 that of the Subordinate Judges as
 defined in Act XVI. of 1868, then
 in force. By Act VI. of 1871,

Regulation VIII. of 1833 was repealed, but its provisions as to the powers of the Additional Judges are re-enacted in Section 7, and since that enactment Additional Judges are gazetted as Additional District Judges, and the officer against whose judgment the special appeal was in this case preferred was so gazetted.

There have been conflicting decisions of this Court upon the question submitted. One, of the 27th February 1873, is reported at page 30, Volume X., B. L. R., App.* In that case it was held that Section 102 referred to cases tried by a District Judge, and not to those tried by an Additional Judge, and the objection that an appeal would not lie was overruled.

In cases 768, 769, 770, 772, 773, and 774 of 1873, decided on the 28th of February 1873 by another Division Bench of this Court, and not reported,† it appears that the appeals were dismissed upon the sub-

jection raised by the respondent that no appeal would, under the circumstances of the case, lie from the order of an Additional Judge.

It seems to me that there can be no appeal in cases decided by an Additional Judge which would not be appealable had they been decided by the District Judge. I do not think that the Local Legislature contemplated any distinction being made between the Courts of the District Judge and Additional District Judge, and I would hold that the words District Judge in Section 102 of Act VIII. of 1869 includes an Additional District Judge vested under Act VI. of 1871 with powers of a District Judge.

MARKBY, J.—I concur in the construction which has been put upon the statute by Mr. Justice Birch.

PHEAR, J.—I concur in the view taken by Mr. Justice Birch, and have but a few words to add. It seems to me that, under the provisions of Act VI. of 1871, the Additional Judge is a District Judge, although, no doubt, not *the* District Judge; he is an Additional Judge attached to the Court of the District Judge. He has the same powers as the District Judge, although his cognizance of cases is in some degree limited. By Act VI. of 1871 a great distinction is made between the status of the Additional and that of the Subordinate Judge; there are no appeals

* 19, W. R., 201.

† These were appeals from decisions passed by the Additional Judge of Hooghly, confirming, in appeal, the decision of the Moonsiff of Ghattal in that district, in a suit for arrears of rent under Act VIII. of 1869. On the appeal being called on before the High Court (*Present*: the Hon'ble Sir Richard Couch, *Kt.*, *Chief Justice*, and the Hon'ble F. A. Glover, *Judge*), Baboo Bama Churn Banerjee, for the respondent, took the preliminary objection that no appeal could lie under Sec. 102, Act VIII. of 1869. After hearing Baboo Umbica Churn Bose for the appellant, the Court dismissed the appeal on the preliminary objection, with costs.

from the decision of the Additional Judge to the District Judge, whereas, on the other hand, the Additional Judge may, as the Additional Judge of the District Judge's Court, hear appeals from the Subordinate Judge. I think that, shortly, the effect of Section 102 of Act VIII. of 1869 is to except the decrees of an Additional Judge from appeals under his character as a District Judge, or Additional Judge of the District Court.

JACKSON, J.—I regret very much to find myself under the necessity of dissenting from my learned colleagues on this occasion. It is only the very strong conviction on my mind on a subject which I have frequently considered that induces me to express the different opinion which I entertain.

Whatever the status of an Additional Judge may have been at the time of the passing of Act VIII. of 1869, and previous to the passing of Act VI. of 1871, it seems to me quite clear that the District Judge of the Bengal Civil Court's Act of 1871 was an entirely distinct person, and a person occupying a wholly different position in the judicial body from the Additional Judge. I think that when the effect of a provision of law is to abridge the ordinary right of appeal, that provision must be construed with the utmost strictness, and that we ought not to take away the right of appeal unless we

are quite sure that the intention of the law was to take it away.

Section 102 of Act VIII. of 1869 says that nothing in this Act shall be deemed to confer any power of appeal in any suit *tried and decided by a District Judge*, originally or in appeal, if the amount sued for, or the value of the property claimed, does not exceed one hundred rupees, in which suit a question of right to enhance or vary the rent of a ryot or tenant, or any question relating to a title to land, or to some interest in land, as between parties having conflicting claims thereto, has not been determined by the judgment. Section 3 of Act VI. of 1871 provides that the number of District Judges to be appointed under this Act shall be fixed, and may, from time to time, be altered by the Local Government; and Section 5 says that whenever the Governor-General in Council has sanctioned an increase of the number of District Judges, the Local Government shall appoint Additional District Judges. That, as I understand it, contemplates the case of an addition to the number of districts, and so regulates the appointment of Additional District Judges to fill that office in such additional districts. After that has been provided for, the Legislature in Section 7 enables the Government in particular circumstances to appoint functionaries called "Additional Judges," and it

is declared that "such Additional Judges shall perform any of the duties of a District Judge under Chapter III. of this Act that the District Judge may, with the sanction of the High Court, assign to them, and, in the performance of such duties, they shall exercise the same powers as the District Judge." Therefore the functions of an Additional Judge are restricted to performing, under deputation as it were from the District Judge, any of the duties of that officer under Chapter III. of that Act, and no further. The words "exercise the same powers" I understand to mean that he shall exercise any such powers as are necessary to the efficient performance of his duties, and not as conferring any attribute such as immunity from appeal on the decisions of Additional Judges when passed. And throughout Act VI. of 1871, wherever grades of Courts are enumerated, Moonsiffs, subordinate Judges, Additional Judges, and District Judges are all mentioned *seriatim* as officers of distinct status, holding separate positions, and exercising different powers. If, indeed, Section 102 of Act VIII. (B. C.) of 1869 had contained the words "decided by a District Judge or an Additional Judge," I should have readily admitted that the finality so given to the decisions of Additional Judges might be conceded to the officer with the same title, though holding a slightly different status created

by Act VI. of 1871. But there are no such words in the Section, and there appears to be quite sufficient reason why the Legislature should have intended to confer particular powers and particular finality of jurisdiction upon the District Judge in like manner as it confer certain special powers on the Collector of the District, although there may be other officers in the same district exercising the general powers of a Collector. The District Judge is usually an officer of greater experience, higher status, and longer connection with the district, and the Legislature might well have thought fit to say that in particular cases, usually of minor importance, the decision of such an officer might be allowed to be final. No such reason, it seems to me, exists in the case of the Additional Judge, and the Legislature, therefore, as I presume, did not include the Additional Judge in the terms of Section 102.

For these reasons I think that whatever exemption from appeal is conferred by that Section, is limited to the decisions of District Judges.

Couch, C. J.—I am of opinion in this case that the appeal is barred. The question referred to us appears to have been decided by myself and Mr. Justice Glover about a year ago.* From my note of the case the question does not appear to have been argued—cer-

* See foot note to page 119.

tainly, at no length—before us ; but after the argument which we have now heard, I retain the opinion which I expressed in that case.

Section 102 of Act VIII. of 1869 says :—" Nothing in this Act contained shall be deemed to confer any power of appeal in any suit tried and decided by a District Judge originally or in appeal. If the amount sued for, or the *value of the property claimed*, does not exceed one hundred rupees, in which suit a question of right to enhance or vary the rent of a ryot or tenant, or any question relating to a title to land, or to some interest in land, as between parties having conflicting claims thereto, has not been determined by the judgment."

It appears to me on reading this Section that the Legislature, in deciding whether there should be an appeal or not in the case there described, looked quite as much, probably more, to the value of the property claimed, and the question in dispute between the parties, than to the position of the Judge who was to decide the suit. It is not a proper way of ascertaining what was the intention, to look at the case merely as an appeal from a Judge having a particular status or holding, a particular rank or position among the Judges appointed under the Civil Court's Act.

Then we find that in Section 7

of the Civil Court's Act provision is made for the appointment of Additional Judges when the business pending before any District Judge requires the appointment of an Additional Judge for its speedy disposal, and the Additional Judge so appointed is to exercise the same powers as the District Judge. I think we may assume that the gentleman appointed to exercise the same powers as the District Judge will be equally competent to exercise them, and that there is not a greater reason that his decision should be subject to appeal than the decision of the District Judge. We also find in Section 21 of the same Act that his decisions are put by the Legislature on the same footing as the decision of the District Judge, for it says that appeals from the decrees and orders of District Judges and Additional Judges shall, when such appeals are allowed by law, lie to the High Court.

I think (as I have already said) that what should be looked at in considering the intention of the Legislature as to the right of appeal are the powers which are to be exercised by the Judge and the nature of the suit, rather than whether he holds the office or possesses the dignity of a District Judge, or has only the name of Additional Judge. It appears to me,—although differing as I do from a learned Judge of so much experience as Mr. Justice Jackson I ca

not but have some hesitation on the subject,—that an Additional Judge comes within the meaning of Section 102 of Act VIII. (B. C.) of 1869 and that an appeal does not lie from his decision any more than from that of a District Judge.

The application for review will, therefore, be rejected.

HIGH COURT, N. W. P.

FULL BENCH.

The 11th May, 1874.

AJ. ODHYA PERSHAD (*Plaintiff*),

vs.

BISHESHUR SAHAI and another.

Act XIV. of 1859, S. 14—Limitation—Prosecuting a suit bond fide in the wrong Court.*

Where a suit, prosecuted *bond fide* and

* Sec. 14, Act XIV. of 1859.—In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bond fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal, if any, has been pending, shall be excluded from such computation.

with due diligence, was dismissed in appeal for want of jurisdiction, and a second suit was afterwards brought in a right Court :—*Held* that, in computing, under section 14* of Act XIV. of 1859, the period of limitation of the suit, the time between the decree of the Court of first instance and the institution of the appeal should be excluded.

TURNER, J.—The question before the Court arises out of a suit for pre-emption, and the circumstances are as follow :—

The sale took place on the 28th January, 1871, and on the 20th January, 1872, the plaintiff instituted a suit† in the Moonsiff's Court to vindicate his right as pre-emptor. On the 30th March, 1872, he obtained a decree, but being dissatisfied with so much of the decree

* Sec. 15, Act IX. of 1871.—In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another suit, whether in a Court of first instance or in a Court of appeal, against the same defendant or some person whom he represents, shall be excluded where the last-mentioned suit is founded upon the same right to sue, and is instituted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to try it.

Explanation 1.—In excluding the time during which a former suit was pending, the day on which that suit was instituted, and the day on which the proceedings therein ended, shall both be counted.

Explanation 2.—A plaintiff resisting on appeal presented on the ground of want of jurisdiction, shall be deemed to be prosecuting a suit within the meaning of this section.

† Sec. 16, Act IX. of 1871 does not apply to suits instituted before the first day of April, 1873 by reason of Sec. 1 of the same Act ; hence Act XIV. of 1859 applies.—*Ed. L. C.*

as determined the amount of the purchase money, he, on the 27th April, 1872, presented a regular appeal, when on the objection of the defendant it was held that the suit had been improperly valued, and that its proper valuation was in excess of the pecuniary limits of the Moonsiff's jurisdiction; and by an order dated the 26th June, 1872, it was ordered that the plaint should be returned to the plaintiff. Some delay, for which it does not appear the plaintiff was responsible, took place in carrying out this order. The plaint was actually returned to the plaintiff on the 1st of August, and was presented by him in the Subordinate Judge's Court on the 7th August, 1872. At the hearing the defendant pleaded limitation; the plaintiff replied that he was entitled to deduct the period during which the former suit was pending, and that period extended continuously from the date on which the original suit was instituted up to the date on which, the plaint, in pursuance of the order of the appellate Court, was returned to him so as to enable him to present it in the proper Court. It was contended by the defendant that at least the interval between the decision of the Moonsiff and the institution of the appeal could not be excluded. The Subordinate Judge, relying on a ruling of the Sudder Dewanny Adawlut, North-Western Provinces, (S. D. A., N. W. P., Vol. 2, 1864, page

602) accepted the contention of the defendant, and dismissed the suit.

The plaintiff instituted a special appeal, and as it appeared at the hearing that the decision of the Sudder Dewanny Adawlut was in conflict with a ruling of a Division Bench of the Calcutta Court (VI., W. R., 308), and the Division Bench* before which the appeal was argued inclined to hold the ruling of the Calcutta Court the more sound, the point was referred for the opinion of the Full Bench.

The decision turns on the construction of the words "engaged in prosecuting a suit." It is apparent from the context that they include not only proceedings in a Court of original jurisdiction, but proceedings in appeal, and this is in accordance with the ordinary sense in which the words would be understood. A man may be said to prosecute his suit so long as he is either demanding a decree from the Court of original jurisdiction, or endeavouring to obtain from an appellate Court a decree refused him by a sub-

* The Divisional Bench (Turner and Spankie, J.J.) before which the appeal originally came on for hearing, made the following order of reference:—"As the ruling of the Calcutta Court, VI., W. R., 308, is directly opposed to the ruling of a Full Bench of the late Sudder Court, North-Western Provinces, S. D. A., North-Western Provinces, Vol. 2, 1864, page 602, and we incline to the opinion that the ruling of the former Court is the more sound, we request the opinion of the Full Bench on the point."

ordinate Court, or if the subordinate Court has passed a decree in his favour so long as he is engaged in supporting that decree in an appellate Court. But it is argued that he can be said to be engaged in prosecuting his suit within the meaning of this section of the Limitation Act of 1859 only while proceedings are actually pending in the original or appellate Court, and not in the interval between the decree of one Court and the presentation of an appeal from that decree in another Court, and this argument is based on the words, "including the time during which such appeal has been *pending*." It is contended that an appeal cannot be said to be pending before it is instituted, and that from the use of the term pending, it is to be inferred that it was the intention of the legislature to exclude the period between the decree of the lower Court and the institution of the appeal.

The result of such a construction would in many cases be to put it in the power of a defendant to defeat a claim by protracting the litigation. If a Court without jurisdiction passed a decree against him, he could refrain from appealing until the last day allowed by law. If a subordinate appellate Court affirmed the decree he could again wait until the last day of the prescribed period before instituting his appeal in the ultimate Court of appeal. By such proceedings,

if a plaintiff sued in a Court not having jurisdiction within four months of the expiry of the period within which he is bound to sue, his claim might be defeated. Looking at the difficulties which must frequently arise in this country in determining what Court has jurisdiction, we should adopt with reluctance a construction which might work such a result as has been supposed. But the construction for which the defendant contends does not seem necessitated even if it be warranted by the language of the section. It has been already pointed out that the term engaged in prosecuting a suit embraces the whole period from the institution of the suit to its determination by an ultimate Court of appeal. A decree which is appealable is not final until the period for appeal has expired and no appeal has been instituted. The proceedings in a suit in which such a decree is passed are continued by the institution of the appeal. The appeals are in fact stages in the suit. The legislature had, when enacting the Code of Civil Procedure, Act VIII. of 1859, recognized the necessity of allowing an interval between the decree of a subordinate Court and the institution of an appeal from that decree; and if it had intended that this interval should not be allowed to a plaintiff when claiming allowance of time under this Section of the Limitation Act, it is to be presum-

ed that the deduction would have been disallowed by an express provision. The words "including the time during which such appeal, if any, has been pending" were not intended, in our judgment, to control the term "engaged in prosecuting a suit," but to make it more clear that the whole period, from the commencement to the final determination of the suit by an ultimate Court of appeal, was to be allowed on proof that the plaintiff had throughout acted *bond fide* and exercised due diligence. In this view the ruling of the Division Bench of the Calcutta Court is the sounder.

BRODHURST, J.—Concurred.

STUART, C. J.—I differ from the District Judge and concur with Turner and Spankie, JJ. in accepting the ruling of the Calcutta High Court mentioned in the referring order, and I substantially adopt the argument by which the ruling is supported. The decision of the Sudder Court of these Provinces, also therein mentioned, is unsatisfactory, proceeding on a view of the Act of 1859 which, in my opinion, is a narrow and contracted one, and inconsistent with the spirit and policy of the law of limitation. Two other cases were cited at the hearing on behalf of the respondents, but they do not appear to me to assist their case. In the first, that of *Nund Doolal Sirkar and others*, appellants, 2, W. R., page 9, there appeared to have

been two suits, one instituted on the 28th of July, 1862, and the other on the 31st of March, 1863; and there was an unexplained delay of upwards of a month in returning the plaint in the first suit, which had been insufficiently stamped; but the case is very badly reported, there being no satisfactory statement of the facts or procedure, and it is difficult to say from the report what the opinion of the Court was. So far as intelligible, the judgment of the Court appears to have been quite mistaken. In the other case, that of *Chunder Madhub Chuckerbutty*, appellant, 6, W. R., page 184, the principal question was, whether the time occupied in prosecuting a suit in which the plaintiff was non-suited could be deducted, and it was held by a majority of the Court that it could not, there having been great laches and negligence on the part of the plaintiff, 12 years and 11 days having elapsed between the accruing of the cause of action and the commencement of the second suit. But there the rule laid down is, that "to entitle a plaintiff to the benefit of the terms of section 14 of the limitation law it must be shown that his suit had been prosecuted *bond fide* and with due diligence, and that the Court was unable to decide upon it from some cause quite unconnected with the default or negligence of the plaintiff. To hold otherwise would be inconsistent with the use of

the words *bona fide* and with due diligence. It does not by any means follow in every case, that because the Court had been obliged to refrain from deciding the case from want of jurisdiction, the party would have been entitled to avail himself of the time during which the suit was pending; because it might so happen that the party knew well that the Court in which his suit had been brought was not the Court to which he ought to go. In that case, the suit was not *bona fide*, and he is not entitled to that time." And again "It appears to me that the inability of the Court must be either some unavoidable circumstance over which no one has any control, or something incidental to the Court itself, and unconnected with the acts of the parties." And so far as I understand the facts of the present case, they come within the principle so stated. No doubt it would have been satisfactory to have had it explained to us why it was that plaintiff waited till the 27th of April before appealing against a decree which had been obtained on the 30th of March. He was, however, clearly entitled to a portion of this time, and probably to the whole of it; and it must not be forgotten that the contention on the part of the respondent must be taken to be, that he is not entitled to have any of it deducted from the period of limitation, a contention which in my opinion is unfounded in law. I

do not think it necessary, in order to satisfy section 14 of the Act, that the prosecution of the suit should continue to be, and be exclusively, actual procedure *in Court*. Arrangement and consultation for proceeding further after the first decree, by means of professional advice and consideration as to the propriety of appealing within the prescribed time, may I think be legitimately considered procedure for the purposes of the section of the Act, in such a suit as the present. The litigious rights of the plaintiff were all the time kept alive, and the decree and appeal connected together forming one continuous and unbroken procedure, of which, in the reckoning of time, he is entitled to have the benefit.

In my opinion therefore the appeal ought to be decreed, and the case remanded for trial and decision on the facts and merits.

OLDFIELD, J.—The question is, whether, under section 14, Act XIV. of 1859, in computing the period of limitation in the case of a suit prosecuted *bona fide* in a wrong Court, the period between the date of the decree of the Court and the date of institution of the appeal shall be deducted from the period of limitation.

I can place no other construction on the language of the section than that it is only the time taken in actually prosecuting a suit in a Court of Judicature, and the time

during which the appeal is actually pending in such a Court, that it is intended should be deducted.

Had it been intended to include the time after decree and before institution of appeal, there would be no force in the words "including the time during which such appeal has been pending."

By the terms of the law, the time to be excluded is that taken in "prosecuting a suit *bonâ fide* and with due diligence in any Court of Judicature." A suit cannot be said to be in prosecution in a Court of Judicature until it has been instituted in such a Court, nor can an appeal, that I can see.

The law insists on the *bonâ fides* and due diligence in prosecuting of parties, and it would be next to impossible to ascertain these points for a time when there are no proceedings before the Court; and this may have been a consideration with the legislature when framing the law.

The law gives an indulgence to parties prosecuting suits in the wrong Court, and it may have well intended that this indulgence should be exercised within well defined limits.

It appears to me that the above construction is the natural one to be placed on the terms of the law, and any other would be to strain the law in an unjustifiable degree. I agree with the Full Bench Ruling of the late Sudder Court,

North-Western Provinces, on this question (Vol. 2, 1864, page 602.)

PEARSON, J.—In my opinion the ruling of the Full Bench of the late Sudder Court of these Provinces, dated 28th November, 1864, is far more in accordance with the terms of section 14, Act XIV. of 1859 than the ruling of a Bench of the Calcutta High Court in 1867, and I am not prepared to admit that the latter ruling expresses the intention of the legislature more correctly than the former; for, had this been the case, the terms of section 15, Act IX. of 1871 would presumably have been adapted and conformed to that ruling; whereas they are not materially different from the terms of section 14, Act XIV. of 1859.

The ruling of the Calcutta Court proceeded on the view that a man might be prosecuting his suit *bonâ fide* and with due diligence while he was seeking advice as to the advisability of appealing, or otherwise making preparation for appealing. But if this view were sound, it might be contended that the time previous to the institution of a suit, while he was consulting his legal advisers as to the propriety of instituting it, or was otherwise preparing to do so, might also be deducted under the section. So latitudinarian a view would obviously be open to objection; and the terms of the section, which expressly allow only the time during which the claimant shall have been

engaged in prosecuting the suit *in a Court of Judicature*, and the time during which an appeal *shall have been pending*, to be deducted in computing the period of limitation, do not warrant, but by implication disallow, the deduction of any further time not actually spent in the prosecution of the suit in the Court of first instance or the Court of appeal. It is no answer to this reasoning to say that the natural construction of the terms of the law would enable a defendant in some cases, by delaying to prefer this appeal, to preclude the plaintiff from instituting a fresh suit. That is only to say that the indulgence which the section grants to suitors who have sued in a wrong Court is not so large as those who make such answer think that it ought to be. To me it appears that a suitor who at the last moment brings his suit in a wrong Court is not entitled to have a deduction from the period of limitation applicable to his suit when re-instituted in a proper Court, not only of the time wasted in the wrong Court, but of such additional time as he may require for,

or use in, his preparation for appealing. Had he not deferred his suit so long, he would not have been so short of time; and I see no reason why he should be protected from the consequences of his dilatoriness in commencing proceedings, as well as from the consequence of his mistake in going into a wrong Court. Anyhow the legislature has only made provision to save him from the consequence of his mistake; and the Courts are not competent to go further, and to extend the indulgence beyond the terms of the law.

The case having been returned to the Divisional Bench, judgment was delivered as follows:—

In accordance with the opinion of the majority of the Court, it must be held that the appellant is entitled to deduct the interval between the decree of the Court of first instance and the institution of the appeal. This appeal is therefore decreed, and the decrees of the Courts below being annulled, the suit is remanded to the Court of first instance, under section 351, for trial on the merits.

least inferentially, the Court must pass judgment separately on the view of facts involved in each charge.

The duty of the jury as a part of the Court is also, plainly, to decide which of the several views of facts presented to it for consideration by the prosecution is true (Section 257) ; and to say specifically as to the view of facts exhibited in each charge whether it is true or not (Section 263). There is no relief from this obligation to come to an express finding with regard to each alleged view or set of facts, except that which is by implication given in para. 2, Section 461, just referred to, and that paragraph applies, as it seems to me, only to cases where the several sets of facts are the alternative representations of one criminal occurrence.

But the alternative views of fact stated in the charge which is now under our consideration, are not alternative views of one criminal occurrence ; they represent two entirely distinct criminal occurrences ; the one being to the effect that the accused on the 23rd January 1873, at Alipore, in the course of a trial of two persons, on a charge of cheating, before Moulvie Abdool Luteef, stated in evidence, &c., which statement he at the time of making it knew to be false, &c. ; the other, that the accused on the 13th February 1873, in the course of the trial of these same two persons, together with a

third person on the same day, before the same Magistrate, stated in evidence, &c., which statement he at the time of making it knew to be false, &c. And therefore,

the spirit of Sections 455 and 461, paragraph 2, are that which I have above described, this case does not fall within either of them. In other words, there does not appear to be in the text of the Criminal Procedure Code any warrant for an alternative charge of this kind, or for an alternative finding of these two substantively different states (or views) of fact, whether exhibited in an alternative charge, or in two separate charges. Consequently, if the text alone of the Code were consulted, it would not, as I understand it, support the conviction which is before us.

And this not a matter of mere technical regularity ; it very closely touches upon the right and satisfactory administration of justice. Obviously it might be of the greatest possible moment to the persons who were being tried before the Magistrate on the 23rd January and 13th February, that it should be distinctly established, in the case now before us, which of the two statements alleged to have been made by the present accused on those two days respectively was false. And therefore a procedure which would enable the prosecution in the present case to procure a conviction of the accused in the alternative, without troubling itself to go the length of establishing the

falsehood of the one statement or the other, might work a serious grievance to those persons. Again, the present accused person himself by an alternative conviction is deprived of the advantage which he ought to have in the event of a material witness to the falsity of one of the statements being convicted of perjury.

If, also, the prosecution is not under a legal obligation to establish the falsity of either statement, then it is plain that it may launch its case upon the bare evidence that the two alleged statements were respectively made, and then leave the prisoner to satisfy the Court as best he can that neither of them was false. This is the course which is most usually taken, and I do not hesitate to say that it is generally most unfair. The contradiction between the two statements is seldom absolute, though there is commonly enough opposition in them to lead a not over-scrutinizing jury to presume it; and the contradiction being arrived at, the falsity again is presumed in spite of anything which the prisoner may say in the dock. Convictions of this character are most unsatisfactory, and do very little to meet any real mischief. Yet the temptation to the public prosecutor to seek them is so great that in this country perjury is hardly ever attacked in any other way. Deliberate perjury persisted in is not often the subject of prosecution in the mofussil Courts.

Several other considerations of public importance might be brought forward; but it seems to be sufficiently plain without more that perjury is the one offence of all others in the Penal Code which calls for precision and unambiguity of statement in the charge and in the judicial finding.

Thus it appears to me that the construction of the text of the Criminal Procedure Code taken by itself, which I have arrived at, accords with the expediency of the matter; and that thereby its reasonableness is in some degree supported. However, when we pass on from the text of the Criminal Procedure Code to the forms of charges in Schedule No. III. appended to the Code, which are prescribed for adoption by Section 442, we find the last of them runs as follows:—

“That you, on or about the day of _____ at _____ in the course of the inquiry into _____, before _____, stated in evidence that _____; and that you, on or about the _____ day of _____, at _____, in the course of the trial of _____, before _____, stated in evidence that _____, one of which statements you either knew or believed to be false, or did not believe to be true, and thereby, &c.”

Now inasmuch as an alternative charge is only referable to Section 455, the fact that the Legislature has authorized this form seems to show that Section 455, was intend-

ed to extend, as it well may, beyond its illustration ; that is to say, to the alternative allegation of different occurrences, at any rate in the particular case which is covered by this form. And it has been argued from the form itself that the finding of the jury and the judgment of the Court may, when such an alternative charge as this is preferred, be in the alternative. But Section 461, para. 2, certainly does not here apply, and it is difficult to see how the distinct provisions of Section 257 can be escaped.

The Full Bench ruling which is reported in 6, W. R., Cr., 65, decided that under the late Criminal Procedure Code, there might be an alternative finding as well in a case in which the evidence proves the commission of one of two offences falling within the same Section of the Penal Code and it is doubtful which of such offences has been proved, as in one in which the evidence proves the commission of an offence falling within one of two Sections of the Penal Code and it is doubtful which of two Sections is applicable. This ruling, if it could be adopted now, would therefore support the finding in the present case. The reasoning, however, by which it was arrived at depended upon two Sections of the old Code, which are not present in the new Code. The first of these Sections was Section 242, which, so far as it is now necessary to quote

it, ran thus :—" When it appears to the Magistrate that the facts which can be established in evidence show the commission of one of two or more offences falling within the same Section of the said Code, but it is doubtful which of such offences will be proved, the charge shall contain two or more heads charging each of such offences." This was held to justify the framing a charge containing two heads, apparently similar in substance to that which is under our consideration. And although this Section 242 of the old Code is not repeated in the new Code, its substitute being the present Section 455, yet, so far as concerns the case before us, the double headed charge may be said to be justified by the last form of Schedule III. Thus we are under the existing Code as well as under the old carried over the first step towards the Full Bench conclusion. And the double-headed charge of two offences having been in this way arrived at, the Full Bench made its second step upon the footing of Section 382, Clause 5, which authorized the jury to find in the alternative upon a double-headed charge. But there is no equivalent to this in the present Code. The jury are now bound to find which view of the facts is true (Section 257), subject only, as before mentioned, to such qualification as is to be found in Section 461, para. 2, which appears to be purposely so

framed as to exclude an alternative finding of two offences falling under the same undivided Section of the Penal Code. It is carefully worded so as to cover the cases belonging to the first part of the old Section 212, but omits those of the second part, among which the Full Bench case and the present case come.

It was thrown out during the argument in this case that the "view of the facts," with regard to which the jury are, by Section 257, called upon to decide whether it is true or not, is, in a double-headed charge, the, so to speak, *entire* alternative view expressed in the charge. But this does not accord with the natural meaning of the words. An alternative charge of the kind, for which this construction of the sentence is especially wanted, puts forward *two* views of the facts which are inconsistent with each other, and which might, if the prosecution had so chosen, been made the subject of a separate charge: either the accused told the truth on the first occasion and falsehood on the second, or *vice versa*. It has been said that the prosecution by alleging in the charge that the accused stated *this* on the first occasion, and stated *that* on the second, and that one of these two statements was false, presents but one view of the facts to the jury; but it appears to me plain that this is not correct. The true effect of the charge is to put

forward in a concise form at least two perfectly distinct views of facts, always inconsistent with each other in those cases for which the ambiguous conviction is most zealously demanded, namely, in those cases where it is assumed to be patent on the face of the two statements that if either one of them is true the other must be false. And the very reason for thus putting forward two views is that the prosecution cannot venture to assert which view is true. When, then, the Legislature says that it is the duty of the jury to *decide* which view of the facts is true, it can hardly mean that in the event of two inconsistent views being in this way simultaneously offered to the jury, with the implied admission on the part of the prosecution that it cannot say which is true, it is enough if the jury finds that either the one or the other is true. Moreover, if the authorization of a double-headed or alternative charge by the force of implication alone authorized a general finding on the evidence that such a charge was made out in one or other of its branches, then it is difficult to see why the express provisions of Section 461, para. 2, were enacted in reference to one class only of doubleheaded or multiform headed charges; for they could hardly have been intended merely to introduce Section 72 of the Penal Code into the Civil Procedure Code. Plain-

ly, by the spirit of Section 455, it not by its words, charges which might under its provisions be put in the alternative, but which are nevertheless left to stand separately, may be dealt with by the Court as if they had been presented in the alternative : and if it is a consequence of an alternative charge that the Court is relieved from the obligation to find which head of it is true, then it seems to follow that Section 461, paragraph 2, is partial and superfluous.

At first I was disposed to think that the Legislature, by introducing into Schedule III. the alternative form applicable to the present case, indirectly, if not expressly, intimated its acceptance of the Full Bench Ruling reported in 6, W. R., Cr., 65, and virtually incorporated the law enunciated by it in the new Act; and this would probably have been so, if the new Act did not substantially differ from the old Act in the particulars which furnished the foundation for the Full Bench decision. But I have already pointed out that these particulars are absent from the new Act. The reasoning by which the late Chief Justice arrived at the conclusion in that case could not be supported upon the basis of the present Act. It appearing, then, that the Legislature when passing the new Act entirely removed the foundation on which the ruling of the Full Bench was placed, we cannot safely infer

from the introduction of the alternative form of charge alone, which answered at most to the first part only of that ruling, that the entire ruling was intended to be enacted.

On the whole, then, though I admit not without great hesitation, I have reached the opinion that under the existing Criminal Procedure Code, while, no doubt, an accused person may be lawfully tried upon an alternative or double-headed charge, such as that which is brought before us in this reference, still the Court or jury must for a conviction find especially which branch of the alternative or head of charge is true.

JACKSON, J.—Having given to the very important question raised in this case the best consideration in power, I come to the conclusion, to which I first inclined, that the finding and conviction are insufficient.

No one can feel a stronger respect than I do for the opinion of Sir Barnes Peacock in such a matter as this, and no one can be more averse to disturbing settled rules of law, but I feel it, for reasons which I shall state in the sequel, to be a duty still more imperative than that of respecting decisions, to express my dissent from a ruling which, I think, in effect adds to the Penal Code an offence not defined by the Legislature.

It seems to me that neither Section 242 of the repealed Code, nor Section 455 of the present Code

of Criminal Procedure (apart from the form in Schedule III. to which I shall presently advert), warranted the exhibition of a charge like that before us, and my persuasion is yet stronger that nothing, at all events, in the existing Code, which is the material question, justifies a finding and conviction in such terms.

It is not requisite now that I should give at any length my reasons for dissenting from the Full Bench decision which is based upon repealed enactments, but I may say that, while I admit the latter clause of the old Section 242 to embrace charges of false evidence based upon statements, given at different times, contradictory of each other, I conceive the Legislature to have had in view in framing that Section the uncertainty as to *which of the offences would be proved*, and therefore to have contemplated the necessity of *proving* one or other statement to be false, and therefore to amount to an offence; and that it did not sanction the mere entangling of the accused in a logical snare from which as a matter of reason he could not escape. As far, moreover, as the words of the Code went, the charges would have, it seems to me, to be exhibited *seriatim*, and not alternatively.

But I find no provision in the Code of 1872 replacing the latter portion of Section 242. On the other hand, the Legislature seeing,

it may be, the dangerous ambiguity of that Clause, has recast the whole Section, and dropping the last clause entirely, has put the other into new words, which seem to admit of no misinterpretation; for while the charge, alternative as to fact, but identical as to offence, is excluded, the many headed charge arising, when several distinct offences are comprised in one Section (as in Section 382, Indian Penal Code), is preserved in the Schedule. Section 452 provides "that there must be a separate charge for every distinct offence of which any person is accused, and every such charge must be tried separately, except in the cases hereinafter excepted." The only exceptions to this rule are contained in Sections 453 and 454, and I do not find that the present case falls within either of them. Further, Section 440 declares that "the charge shall contain such particulars as to the time and place of the alleged offence, and the person against whom it was committed, as are reasonably sufficient to give notice to the accused person of the matter with which he is charged." And Section 441 goes on to declare that "when the nature of the case is such that the particulars mentioned in Sections 439 and 440 do not give sufficient notice to the accused person of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the offence

was committed as will be sufficient for that purpose”

One of the illustrations to this Section (C) is to this effect: A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false. There is nothing in the text of the Criminal Procedure Code which qualifies these clear provisions in the case of perjury.

Giving false evidence in a stage of a judicial proceeding, by stating falsely before the Magistrate, &c., &c., is a distinct offence.

Giving false evidence in a stage of a judicial proceeding, by stating falsely before the Court of Session, is also a distinct offence. Would it be a compliance with the Sections I have quoted to put these distinct offences into one charge, and to allege that A had either given false evidence at a certain time and place against X, by saying so and so, or given false evidence at a certain other time and place against the Queen, by saying something else?

I think it would not. But we are told that a charge, if not in accordance with these Sections, is expressly authorized by the 3rd Schedule, which no doubt may be read as part of Section 442, having been removed to the end of the Act merely for the sake of convenience to avoid interruption of the sense. The Section says:—“The

charge may be in the form given in the 3rd Schedule to this Act, or to the like effect;” and where a form so given seems to be directly at variance with precise rules contained in the Code itself, I prefer to stand by the rules.

But the composition of the Schedule, and, in particular, the place allotted to this very form of charge, with the wording of it, appears to me to indicate that it has suffered from one of the inadvertencies almost unavoidable in the preparation of so long and intricate an Act. The 3rd Schedule is divided into two parts:—

I. Charges with one head.

II. Charges with two or more heads.

On the first I need not observe.

The second is framed to answer the purposes of Section 455 in the same way that Section 243 of the repealed Code was subservient to Section 212.

But while those two Sections used in common the expression heads of charge, it is disused in Section 455 (“in the alternative” being employed instead) and appears only in the Schedule, where, on the other hand, the term alternative does not appear except to denote the peculiar form under Section 193, Indian Penal Code, which, however, is a matter quite different from what is spoken of as alternative in Section 455.

And, curiously enough, the Schedule gives no form of charge upon

the most obvious and usual alternative case, *viz*, that of doubt between the offence of the theft and that of criminal breach of trust.

On the other hand, a variety of charges with more than one head are supplied, which have been rendered useless by Sections 456 and 457. For instance, why need a Magistrate now draw up several heads of charge against an accused for murder, culpable homicide, grievous hurt, and so forth, when upon a charge of a murder or of culpable homicide a conviction for any offence of the same nature but inferior in degree may follow?

The form called "alternative charges in Section 193" comes also into this division, though it is not a charge with several heads at all, but something entirely distinct, and, as I think, not warranted by any Section of the Code at all.

I pause here to remark that the old Code provided forms of conviction. The present Code does not; and while the old Code setting out forms of charge with several heads for doubtful cases, provided alternative forms of conviction, the new Code gives in the Schedule several many headed charges and one alternative charge.

Having said this, I return to the wording of this charge.

It does not run,—that you, on or about the _____, intentionally gave false evidence by stating

_____, and thereby committed _____, or

that you, on or about _____, intentionally gave

_____, and thereby committed

_____ ; but "that you,

on or about the _____, stated in evidence _____, and

on or about _____ stated _____,

one of which statements you either knew or believed to be false, &c., and *thereby* committed an offence."

That is to say, the offence is made to consist of having made first the one statement, afterwards the other, one of them being false, though the Magistrate has not been able to determine, perhaps not taken the trouble to enquire, which.

Now, besides that the offence here stated is not that defined by the Penal Code, and required to be set out by the Criminal Procedure Code, namely, the intentional making of a particular false statement, but simply the making of two statements at different times, one or other of them being known to be false, it will be observed that so far as this form of charge goes, the two statements need not be contradictory one of the other. Also that in fact the two statements though contradictory may *both* be false, and not one only. As for instance, if the witness swore on the preliminary enquiry that he had seen the accused without provocation strike the deceased a blow with a club,—such statement being prompted by enmity; and afterwards on the trial swore that he had not seen the accused strike the

deceased at all,—this latter statement being brought about by the receipt of a large bribe,—the fact being that the witness had seen the accused, when irritated by the foulest insult, strike the deceased a blow with his fist, which blow, contrary to probability, produced death.

It appears to me, therefore, that the form in question is neither consistent with the positive provisions of the Code as to charges, nor sufficient for the purposes which it seems to contemplate.

One may indeed suspect that it was framed to meet, not the definition of any offence as contained in the Penal Code, but either the ruling of the Full Bench in VI., W. R., or the exposition of the law of perjury promulgated by the Nizamut Adwalut in their Circular Order No. 126 of Vol. III. and No. 10. of Vol IV.

In the first-mentioned Circular Order that Court directed (overruling a previous reported decision of two Judges, of whom one was the illustrious Colebrooke) that where a prisoner was arraigned for perjury on two contradictory statements, it would not be necessary to prove the falsity of either.

In the second Circular Order they prescribed a form of charge which, at all events, had the merit of being exact and complete according to the views which the Court at that time entertained.

It may be observed that the establishment of perjury by contradictory statements is taken from the Mohammedan law, as expounded by the law officers of the Sudder Court in an elaborate opinion printed in No. 656 of the *Constructions* (the passage will be found at page 21 of the second volume, 4th Edition.)

The Sudder Judges, however, in adopting it annexed to it an important qualification, *viz.*, that the contradiction should be on a point material to the issue of the case. This restriction, in accordance with the present law as to giving false evidence, would be and is held unnecessary, so that the charge before us is going beyond Sudder practice, and is in fact pure Mohammedan law of the Mooftees.

We are not concerned at present with the enquiry whether the law should be so, but have only to consider whether it is so or not.

I have hitherto discussed the matter with reference to the charge, and I now turn to the conviction, upon which I found arguments which appear to me conclusive of the matter.

In the first place it may be well to state what, in my view, according to the Code of Criminal Procedure, is the bearing which the charge has upon the conviction.

The charge I take to be, first, a notice to the prisoner of the matter whereof he is accused, and it must convey to him with

sufficient clearness and certainty that which the prosecution intends to prove against him, and of which he will have to clear himself; second, it is an information to the Court, which is to try the accused, of the matters to which evidence is to be directed, and by the forms and illustrations provided the Legislature no doubt indicates what in certain instances it deems to be a sufficient compliance with the rules which it has laid down.

Thus it may be that the framers of the law intended to furnish in reference to Section 193 of the Penal Code a convenient and suitable form in which an accusation founded on contradictory and, probably, false statements might be exhibited, though it seems to me that the intention has not been successfully carried out.

But precise and positive rules apply to the conviction, and a judgment of conviction which not in conformity with those rules is bad in law.

Section 461 declares that the judgment, if the accused person be convicted, shall distinctly specify the offence of which, and the Section of the Indian Penal Code under which, he is convicted; or if it be doubtful under which of two Sections, or under which of two parts of the same Section, such offence falls, the Court shall distinctly express the same and pass judgment in the alternative.

The accused cannot be convicted of matter not contained in the charge, except as provided in Sections 456 and 457; but however loosely the charge may have been framed, the conviction must be precise except in the particular cases, now very accurately defined, where the law allows an alternative judgment.

If the trial in a Court of Session is held with the aid of assessors, the Judge with whom the decision rests must record "the point or points for determination, the finding thereupon, and the reasons for the finding" (Section 464).

If the trial is by jury, a partition of functions takes place, and it is the duty not of the Court, but of the jury, "to decide which view of the facts is true" (Section 257); and it must appear in the Judge's record of the heads of his charge to them that the proper point or points for determination have been laid before the jury.

And therefore I think it clear that when the prisoner is charged with having given false evidence in making this statement or that, the finding must be express:—

1st.—Because an alternative finding will not satisfy the requirements of Section 461.

2nd.—Because there is no other warrant for any kind of alternative finding.

3rd.—Because a bare finding that he has given false evidence will not suffice, for the definition of false

evidence in Section 191, Indian Penal Code, demands the making of some statement which is false, and by Section 441, Code of Criminal Procedure, illustration (C), the particular statement must be set out, whereas the jury here has not found that either statement is false.

4th.—If it be a question raised in the charge which of the two contradictory statements is false (if only one be charged as false), then it would seem that the Jury, as having the duty of deciding which view of the facts is true, must find that this or that statement is proved to be false, or that both are found, or that neither is found, to be false.

And it seems to me highly inexpedient that an ambiguous verdict of the kind contended for should be permissible, for it is obvious that the degree of criminality involved in such a charge may vary almost infinitely; for as already observed, the more venial or the more wicked of the two statements, or both, might have been false, and one of the many consequences would be that, from the uncertainty of the facts found, the Appellate Court would be quite unable often to exercise any control, or even express an opinion, as to the measure of punishment which was proper in the case. Other embarrassments and other unsatisfactory results might ensue.

If, for instance, one of the false statements charged had been in support of a charge of murder, the

accused, if he were convicted, might, in a certain case, be punished with death under Section 194.

Could the Court which tried him tack on to an alternative as to fact, a second alternative as to offence, and say that he had either given false evidence for which he might be hanged under that Section, or given some other false evidence by which he could be imprisoned only under Section 193; and although, if this could be done, the Court would be bound under Section 72, Indian Penal Code, to award the lighter punishment, would it be desirable, would justice be satisfied, if so momentous an issue were left undetermined as to whether the prisoner had or had not given false evidence with intention, and had thereby caused an innocent person to be convicted and executed in consequence of his false evidence.

Nor does the question apply only to the case of false evidence: at least one other instance occurs to me in which, if the arguments for the Crown be well founded, analogy would authorize an alternative finding. I mean the offence of bigamy.

There is a case cited in 1, Hale, 693 (page 692, Edition of 1800), called the Lady Madison's case:—A married B, and afterwards during B's life married C. B then dying, but in the lifetime of C she married D. This marriage of A with D was not bigamy, because, B living, the marriage to C was void.

Now let us suppose that in this case the evidence left it in doubt whether B had been living at the time of A's marriage with C, could A have been charged alternatively with having committed bigamy either with C or with D, for if B was then living the marriage with C would be bigamy ; but if he was dead, then the marriage with C would be good, and the marriage with D bigamy, and could she be convicted on such alternative charge?

I conclude therefore that the conviction in this case is not sustainable, and I would order the appellant to be discharged.

The contrary, no doubt, was held seven years ago by a Full Bench of this Court. The precedent has been followed, though, it has always appeared to me, unwillingly by the Division Benches, and there is this further reason for adhering to it now that the ruling has been adopted by the High Court of Madras.

But this does not bind my conscience.

The Courts are bound to solve, to the best of their ability, questions of law which arise in the course of their business, and if these questions relate to civil rights or obligations, and the rule becomes settled, persons begin to shape their conduct thereby, and numerous titles are founded thereupon, and the mischief of unsettling titles far outweighs the benefit of

securing scientific accuracy of decision.

If scores of men, however, have been improperly convicted and punished on erroneous views of the law, that is not in my opinion a good reason for proceeding to convict and punish others on the same view.

The Courts are not empowered to inflict penalties for that which the law has not constituted an offence, nor are Courts which are subject to a Code of Procedure, in cases provided for by that Code authorized to act otherwise than in accordance with the procedure enjoined.

The Legislature might, of course, if it thought fit, prescribe a punishment for contradictory statements, material or otherwise, made before a Court of Justice, as an impediment in the way of justice, though whether in so doing an equally serious mischief might not be done by, as it were, constraining men through fear of certain punishment to cleave to false statements once made, may be worth considering.

And if the occurrence of this case should have the effect of bringing about an authoritative declaration by the Legislature, one way or the other, I shall not regret having brought the matter under the serious attention of my colleagues.

COUCH, C. J.—The charge in this case against the accused was first that he did, on or about the 23rd

of January 1873, at Alipore, in the course of the trial of Toolsee Dass Dutt and Mahomed Luteef on a charge of cheating, state in evidence before Moulvie Abdool Luteef, the Deputy Magistrate of Alipore, that "the greater part of the furnitures were sent by me to that house (*viz.*, the house at Chitpore), and a small portion by Behlios and Zuhoorooddeen;" and that he did, on or about the 13th of February 1873, at Alipore, in the course of the trial of J. R. Belilios, Toolsee Dass Dutt, and Mahomed Luteef in the same case of cheating, state in evidence before Moulvie Abdool Luteef, Deputy Magistrate of Alipore, that "Belilios never sent furniture of his own, or any furniture of his own or any one else, to that house, (*viz.*, the house at Chitpore), nor was any of the furnitures in that house belonging to Belilios," one of which statements he either knew or believed to be false or did not believe to be true, and that he had thereby committed an offence punishable under Section 193 of the Indian Penal Code.

The second charge is similarly framed, and states that the accused gave evidence on the 23rd of January 1873 and the 13th of February 1873, at Alipore, and that he either knew or believed one of the statements to be false, or did not believe it to be true.

It is material to notice that the charge does not allege that the

statement made on the 23rd of January 1873 was known or believed to be false, or not believed to be true. Nor does it allege that the statement made on the 13th of February 1873 was known or believed to be false, or not believed to be true. It merely alleges that one of the two statements set out in it was known or believed to be false by the accused, or not believed by him to be true.

Upon this charge he was tried, and in the summing up of the Judge, the jury were told, and very properly: "Before you can find him guilty you must be satisfied that he made one or other of the statements contained in the charge, knowing that such statement was false, and deliberately intending to make a false statement." The majority of the jury found that the accused was guilty of the offence specified in the first and second heads of charge,—the offence specified being an offence punishable under Section 193 of the Penal Code.

After such a summing up, calling the attention of the jury so plainly to the necessity of their being satisfied that one or other of the statements was known to be false, and that the accused deliberately intended to make a false statement, I think there can be no doubt that the offence of giving false evidence within the meaning of Section 191 of the Penal Code was committed on one or other of the occasions

specified in the charge. Then it appears to me that the only question is, was it necessary, in order to make the conviction legal, that the jury should find on which of the two occasions the offence was committed. Does the law in this country render that essential to a conviction for giving false evidence?

The 439th Section of the Code of Criminal Procedure now in force requires that the charge shall state the offence with which the accused person is charged, and the 440th that the charge shall contain such particulars as to the time and place of the alleged offence, and the person against whom it was committed as are reasonably sufficient to give notice to the accused person of the matter with which he is charged. The charge in this case does that. It states what the offence is, namely, that the accused committed an offence punishable under Section 193 of the Penal Code, and it contains such particulars as to the time and place as give sufficient notice to the accused of what he is charged with. He is told that by making the two statements, one of which it is alleged he knew or believed to be false, or did not believe to be true, he committed an offence punishable under Section 193.

Section 442 says that the charge may be in the form given in the 3rd Schedule to the Act. In that Schedule there is such a form of charge as was made against the ac-

cused in this case, and it appears to me that unless a conviction upon a charge so framed is allowed by law to be valid, the putting this form of charge in the Schedule was not only useless, but is also inconsistent with saying that the jury is required by the law to find and to state upon which of the two occasions mentioned in the charge the false evidence was given. If the jury is required to state that, then two charges in the form No. 10 in the Schedule would be proper. One would state that evidence was given on the 23rd of January 1873 which the accused either knew or believed to be false, and the other would state that evidence was given on the 13th of February 1873, which the accused either knew or believed to be false. If it is required by the law that the jury or the Court, where the trial is with assessors, should find distinctly on which of the occasions the false statement was made, the alternative charge given in the Schedule is perfectly useless.

Again, if it is necessary for the jury, in order that the conviction shall be valid, to say which of the two statements is the false one, it is requiring the jury to find what is not alleged in the charge. All that the charge alleges is, that one of the statements was known or believed to be false, or not believed to be true, and that thereby the offence was committed. Such a charge being authorized by the

law, it appears to me that all which the Court has to find to sustain a conviction for giving false evidence is, that the allegations in it are proved.

In considering what the intention of the Legislature was in making these provisions in the new Code of Criminal Procedure, and giving in the Schedule this form of charge, I think it is important to see what, at the time this Act was passed, was the acknowledged state of the law. It had been decided by a Full Bench of this Court that a conviction upon a charge of this description was legal. That view of the law had been acted upon undoubtedly for some years in this Presidency. In Madras, as appears from the case reported in 4, Madras High Court Reports, p. 51, the same view of the law was adopted, and it cannot be doubted that this decision was acted upon in that Presidency. We have no reported case in the Bombay High Court, and I do not desire to speak merely from memory as to what was the practice in that Presidency. But in Madras and in Calcutta, and my belief is in Bombay also, the law was considered at the time this Act was passed to be that a conviction of a person who was found to have intentionally made contradictory statements on oath or solemn affirmation was legal. I cannot think that the Legislature intended, by the way in which the new Code has been drawn, by the

omission of certain Sections which are in the old Code and the substitution of others which probably were supposed to be an improvement in the wording or arrangement of it, to alter the law as to the offence of giving false evidence. That this charge, although called an alternative charge, and being so far alternative that two statements are set out in it when one offence only is alleged, namely, that the accused thereby, that is, by making statements one of which he knew or believed to be false, committed the offence, should be considered as a charge of but one offence, and was to be dealt with by the jury as such, I think is shown by Section 452 which says that there shall be a separate charge for every offence.

It was argued that it would prejudice the accused in respect of his subsequently pleading an acquittal or a conviction, if a conviction were allowed upon a charge framed as this is, and that he might be tried again for making one or other of the statements which are the subject of the present charge. Section 460 provides for a person who has once been tried for an offence and convicted or acquitted of such offence, not being liable to be tried again on the same facts for the same offence, nor for any other offence for which a different charge from the one made against him might have been made under Section 455, or for which he

might have been convicted under Section 456.

If the question should ever come before me, what is the effect of a conviction or an acquittal upon such a charge as this, I should hold that the accused could not be tried again for giving the evidence on either occasion which is set out in the charge, for then he would be tried again on at least a part of the same facts as he had been tried upon before.

I concur with my learned brethren in thinking that the second part of Section 461 does not apply to this case. This is a charge of but one offence, and the conviction is a conviction of that offence, and need not specify more than the offence of which the person accused is convicted. Here the jury found upon the facts proved before them that the accused committed an offence punishable under Section 193. It appears to me that this finding is a good finding; nor do I see that Section 257 as to the duties of the jury interferes with it, or prevents the finding being as it is.

Section 257 says that it is the duty of the jury to decide which view of the facts is true, and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned. I understand this to mean that it is the duty of the jury to find whether the view of the facts that the accused made the two

statements, that they were such that they could not both be true, and that he knew or believed one of them to be false, is true. I do not understand it as meaning that the jury have to select from a part of the charge some of the facts and say whether they are true. What is meant, is the whole view of the facts alleged against the accused, the view taken by the prosecution which leads to the conclusion of his guilt, or the view which is set up on his behalf and which would make him innocent; I do not feel at all pressed by the provisions of Section 257.

It appears to me that this was a charge authorized by the law, and that the allegations in it which are sufficient to support a conviction have been found by the jury to be proved. If it is a good charge, nothing more is necessary to be found by the jury than that the allegations contained in it are true. I cannot say that it is an illegal charge, finding it, as I do, deliberately allowed by the Legislature, and inserted in the Schedule which is referred to in Section 442.

I think therefore that the conviction is a good one.

I have to mention that two learned Judges not now present, Mr. Justice Glover and Mr. Justice Pontifex, are also of opinion that the conviction is good.

KEMP, J.—I concur.

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HIGH COURT, N. W. P.

FULL BENCH RULING.

The 1st December, 1873.

MUSSUMUT CHUNDO (*Defendant,*)

versus

HAKHEEM AHM-OD-DEEN (*Plaintiff*.)

Pre-emption.—Mahomedan Law.—

Section 24, Act VI. of 1871.

Under section 24 of Act VI. of 1871, Mahomedan law is not strictly applicable in suits for pre-emption between Mahomedans not based on local custom or contract, but it is equitable in such suits to apply that law.

The application of Mahomedan law in a suit for pre-emption between a Mahomedan claimant of pre-emption and a Mahomedan vendee, on the basis of that law, is not precluded by the circumstance of the vendor not being a Mahomedan.

The following statement of the facts seems necessary :—

In this suit the plaintiff claimed possession of one-fifth share of a Court-yard by right of pre-emption under the Mahomedan law. The plaintiff and the vendee were Mahomedans, the vendor was a Hindu. The defendant (the vendee) pleaded that pre-emption did not prevail where the property in suit was situated. The first Court deemed it necessary, as the vendor was a Hindu, to consider whether the custom of pre-emption prevailed in the locality where the property was situated and dismissed the plaintiff's suit. The Lower Appellate Court was of opinion that as the plaintiff and the vendee were Maho-

medans, and as the vendor, although a Hindu, was no party to the suit, that Sec. 24,* Act VI. of 1871 must govern the case, and the Mahomedan law form the rule of decision ; he therefore reversed the decree of the first Court. The defendant appealed.

The following order was passed by the Divisional Bench (Pearson and Jardine, J.J.) before which the special appeal originally came on for hearing :—" On the hearing of this appeal it has been found necessary to determine, in reference to the provisions of Section 24, Act VI. of 1871, whether the Mahomedan law is applicable in suits for pre-emption between Mahomedans, not based on local custom, or on contract. We think it proper to refer the point for consideration to a Full Bench. Should the Mahomedan law be held to be applicable in such suits, we desire to refer the following question also to the Full Bench :—Whether that

* Sec. 24 Act VI. of 1871.—When in any suit or proceeding it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Muhammadan law in cases where the parties are Muhammadans, and the Hindu law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished.

In cases not provided for by the former part of this section, or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience.

law applies in cases in which the pre-emptor and the purchaser are Mahomedans, but the vendor is not a Mahomedan. There are some rulings on this point,—*vide* 10, Beng. L. R., 117, and Allahabad High Court, Kuramut Ali and Mussumat Dukhoo and others, dated 3rd April, 1873, but we consider that the question calls for further deliberation.”

The following opinions were delivered—

PEARSON, J.—For the reasons stated in the opinion recorded by me on the reference made to the Full Bench in Special Appeal No. 161* of 1873 (Mussumat Shumshool-nissa, plaintiff, appellant, *versus* Zohra Beebee and Bahadoor Khan, defendants, respondents), I am of opinion that the Mahomedan law is not, as such, strictly applicable under section 24, Act VI. of 1871, in suits for pre-emption between Mahomedans not based on local custom or contract; but I also conceive that it must nevertheless be enforced in such suits in compliance with justice, equity, and good conscience. The right of pre-emption being one of a very peculiar nature, known only to the Mahomedan law, being not in itself unjust or inequitable, although a factitious rather than an absolute right, having not only been uniformly and uninterruptedly recog-

nized among Mahomedans, but having proved itself to be so consonant to the feelings of the natives of India as to have met with acceptance in a modified form even among Hindus, it would be inequitable either to disallow the right, or to allow it merely in the abstract, without allowing at the same time all its conditions and limitations, the incidents from which it cannot be separated, as fixed by the Mahomedan law. A distinction may be drawn in this respect between the subject of pre-emptive rights and that of sales and other like contracts and transactions. The latter are not peculiar to the Mahomedan law, but are known alike to all codes of law, and questions relating to them may fairly be decided, not by the rules to be found in any particular code, but by the universal principles of justice and equity applied in good conscience. The doctrine of pre-emption is exclusively known to the Mahomedan law, and that law on the subject must be accepted and followed either not at all or wholly.

On the other question referred to us, I am of opinion that the circumstance of the vendor not being a Mahomedan does not preclude the application of the Mahomedan law in a suit for pre-emption between a Mahomedan claimant of pre-emption, and a Mahomedan vendee, on the basis of that law. The vendor is not in the least degree interest-

* Full Bench Ruling reported in 2, *Legal Companion*, p. 87.

ed in the matter of such a suit, and need not be considered;—he has sold his property and received his price, and the transaction, so far as he is concerned, has come to an end before the right of pre-emption arises. That right is held by the Mahomedan law to accrue, after a sale, to a neighbour or a partner—*viz.*, a right to purchase the property from the vendee for the same price which he gave for it. In the decision of the 3rd April last, the right of pre-emption arising out of the Mahomedan law has apparently been confounded with that accruing from a contract or a local custom. In the latter case it may be the duty of a vendor to offer the property to neighbours or coparceners before selling it to a stranger; in the former no such duty is imposed on him. For the reason above stated, I am likewise unable to adopt the view taken by the Calcutta High Court, that the right of pre-emption depends on the nationality of the vendor, or the law to which he is subject. The vendor stands, as I have observed, outside of the question of pre-emption, which may properly be determined between the claimant of pre-emption and the vendee, being Mahomedans, according to their law.

JARDINE, J.—In the case of *Shumsh-ool-nissa versus Zohra Beebee and Bahadoor Khan*, Special Appeal No. 161 of 1873, I have expressed my opinion that

the Mahomedan law is, strictly speaking, applicable only to questions of the kind specially mentioned in section 24, Act VI. of 1871. Pre-emption, which is a branch of the law of sale, is not among the subjects there enumerated, and I must therefore hold that the Mahomedan law, as such, does not govern it by virtue of the Act.

The Courts must decide cases relating to pre-emption in accordance with “justice, equity, and good conscience.” But it is admitted that the Mahomedan law, with perhaps some slight modification where it seemed to be very inequitable, has invariably been the rule of decision in our Courts. Rights have grown up, and expectations have been formed which we ought not lightly to disturb. Moreover the law of pre-emption is peculiar, or almost peculiar to the Mahomedans, and regulates a right which does not exist under many other systems. It would be difficult to say that such a right is contrary to equity, though the policy of the law may be doubted. Under these circumstances, it appears to me that justice and equity and good conscience require us now to recognize the right of pre-emption, with the incidents which have been attached to it by Mahomedan law and the practice of our Courts, and thus virtually to follow the Mahomedan law on the subject.

It thus becomes necessary for me to answer the second question before the full Court, and to determine whether, as between a Mahomedan pre-emptor and a Mahomedan purchaser, the right can be enforced in spite of the fact that the vendor is a Hindu. If the true theory of pre-emption be that the owner of land holds it subject to a disability or obligation, it is evident that it cannot apply in the case where the land is held by any one who is not a Mahomedan, because in his hands it would be free from an obligation which binds Mahomedans alone. When the administration paper of a village contains a stipulation for pre-emption it is often couched in this form. It is provided that any shareholder desirous of selling his share shall first offer it to other shareholders, and only on their refusing to buy, to a stranger; and each shareholder holds subject to the condition. This, however, does not appear to be the theory of Mahomedan law. It places no restriction on the power of sale. It requires from the owner no offer to the co-partner or neighbour prior to sale to a stranger. It leaves him to sell to whomsoever he pleases, but it gives a right to the co-sharer and the neighbour which he can enforce against the purchaser, and against the purchaser alone, and only after an actually completed sale. If, therefore, the purchaser be a Mahomedan, it seems that the

pre-emptor may fairly address him in terms like these:—"You have purchased property in which I own a share. Under our law you must let me take it paying you the price;" and it would, upon the view above stated, be no answer to the claim to say that the purchase was from a Hindoo, for the Mahomedan purchaser is not the less bound under his own law to yield to the convenience of the claimant.

This view appears to be strongly supported by the numerous rulings of the Courts, including a Full Bench ruling of the Calcutta High Court, to the effect that where the vendor and pre-emptor are Mahomedans, but the purchaser is not a Mahomedan, the law of pre-emption does not apply. These rulings (in which I concur) can be justified only on the view that the right of pre-emption is a legal obligation binding on a Mahomedan purchaser, and not a disability attaching to the land in the hands of a Mahomedan vendor. If the Mahomedan vendor could be regarded as holding his land subject to a sort of reversion in the co-sharer or neighbour, he could not be allowed to defeat that right by selling to a Hindoo.

The two precedents which have been mentioned in our referring order apparently rest upon the view of pre-emption which I have ventured to describe as erroneous. In the decision of this Court, *Kuramut Ali versus Mussamut*

Dukhoo and others, 3rd April, 1873, the learned Judges gave the following reason for their decision:—"There was no duty in the vendor to offer it to his neighbours or to give them a prior option of purchase."

These words would be properly used if the question had turned on the pre-emptive right which by contract or custom is ordinarily recorded in the wajiboolurz of a village; but they certainly do not correctly describe the right of pre-emption under Mahomedan law. That law demands of the vendor no previous offer of any kind. Differing from the conclusions arrived at in the cases referred to, I am of opinion that between a Mahomedan pre-emptor and a Mahomedan purchaser the Mahomedan law applies, whoever the vendor may be.

It may be said that the value of property in the hands of persons who are not Mahomedans will be diminished by the operation of Mahomedan law by the loss of a completely open market. It may be so; but there is in this nothing exceptional. If Mahomedans were to enter into a contract among themselves to the same effect as their law, it would be enforced, however prejudicial it might incidentally be, to the value of property in the hands of others.

SPANKIE, J.—I have already recorded my views on the first point referred to us. As to the second question, I quite concur in the de-

cision of the Calcutta Court published in X., Beng. L. R., p. 117.

STUART, C. J.—The principles of construction I have explained in my judgment in Special Appeal No. 161 of 1873 equally applies to the first point referred to us. In regard to the second point I have some difficulty, but I feel the force of the reasons given by Mr. Justice Pearson and Mr. Justice Jardine, and on the whole, though not without hesitation, I concur with them on this point.

CALCUTTA HIGH COURT.

The 23rd April, 1874.

The Hon'ble Louis S. Jackson and W. F. McDonell, Judges.

Special Appeal from a decision passed by the Additional Subordinate Judge of 24-Pergunnahs, dated the 4th August 1873, reversing a decision of the Moonsiff of Alipore, dated the 8th November 1872.

NUBEE BUKSH *alias* GOLAM NUBEE and others (three of the Defendants) *Appellants,*
versus

KALOO LUSHKER and others (Plaintiffs) *Respondents.*

Pre-emption—Mahomedan Law.

As soon as a contract is ratified by acceptance, and the vendor has gone so far that he cannot legally draw back, it is time for the pre-emptor to step in.

A pre-emptor is not required to tender the purchaser's price, or any price, at the time of making his demand, and so long as a party claiming a right of shuffa pays the amount which the Court considers to be the proper

price, he brings himself in Court within a reasonable time.

On the question of pre-emption the Court must act in strict accordance with the provisions of the Mahomedan law, rather than on what it thinks just and equitable.

JACKSON, J.—This was a case of asserted pre-emption on the part of the plaintiff, who sought to enforce that right under the Mahomedan law. His suit was dismissed by the Moonsiff, who not only considered that the forms required by the Mahomedan law on that subject had not been complied with, but entirely disbelieved the witnesses called by the plaintiff, and we are bound to say he assigned some very good reasons for disbelieving them. This decision was appealed against, and the Subordinate Judge, Baboo Kedaressur Roy, who heard the appeal, reversed the judgment of the Moonsiff, holding that the requisite forms had in substance been complied with, and that there was no ground for rejecting the testimony of the plaintiff's witnesses. He consequently gave the plaintiff a decree. Several objections have been taken to that decision. The learned Counsel for the appellant contended, in the first place, that the plaintiff's claim had not been made at the proper time, because the contract had not then been reduced to writing, and he showed that the kotalah executed by the defendant bore a later date than that mentioned by the plaintiff as the date of purchase. On behalf of the respondent it is con-

tended that a contract under the Mahomedan law may be complete without being reduced to writing and engrossed on stamps, although the exigencies of the law of British India require that in certain cases a contract should not only be a written one, but must be engrossed on stamp and also registered. It seems to us that as soon as a contract between two parties is ratified by acceptance and the vendor has gone so far that he could not legally draw back, and the purchaser might compel him specifically to perform his part of the contract, the sale is made so far as makes it time for the pre-emptor to step in. That, it is not denied, has taken place in the present instance.

A further question was as to the difference in price, for it appeared that the plaintiff wanted to take the property at a price less than what the purchaser had offered. On this point it seems to us that a pre-emptor is not required to tender the purchaser's price, or any price at the time of making his demand, and so long as a party claiming a right of *shuffa* pays the amount which the Court considers to be the proper price, we think he brings himself in Court within a reasonable time.

Another point was the alleged equal or superior right of the defendant. On this point it seems to us that the Subordinate Judge, although he does not come to a very clear finding on this question,

has virtually found that the claim of the plaintiff is superior to that of the defendant.

There is one point, however, on which the judgment of the Lower Appellate Court is, we think, not sufficient, that is, as to the complete and strict observance of the forms required by the Mahomedan law. This right of *shuff'a*, as has been repeatedly observed in this Court, is a very peculiar right, weak in its nature, and one which requires for the comfort of the community to be enforced by proper observance of all its essentials. One of those essentials is the performance of the ceremony called *tullubeh ist shehad*. Now it seems to us that on this part of the case, and we think also to some extent as to the respective rights of the plaintiff and the defendant on the question of pre-emption, the Subordinate Judge has looked rather in the light of what he thought just and equitable than in strict accordance with the express provisions of the Mahomedan law. There is, it seems, at least in so far as is shown to us, only one witness, *viz.*, Jonab Ali, who has deposed to the express terms in which the ceremony called *tullubeh ist shehad* is made. We are willing to concede, if that witness could be entirely and absolutely believed, that the words to which he deposes may be accepted as a compliance with the terms of the law, regard being had to the parties claiming the right in

this instance, who are persons of an inferior class and not acquainted with the Arabic language, and for whom some allowance must be made; but it seems to us to be a very serious question whether this witness is to be believed. The Moonsiff, as we have already said, expresses himself in very strong terms as to the credibility of the plaintiff's witnesses, and the Subordinate Judge, before he overrules that conclusion, ought to give the very fullest weight to the opinion of the Judge who heard the witnesses. It is not competent to us sitting here in special appeal to determine finally whether this witness or that witness is to be believed. We think, therefore, that the case must go back to the Lower Appellate Court in order to determine carefully whether the witness Jonab Ali is to be believed in the statements that he makes, and whether the words which he describes as having been used by the purchaser on this occasion, were words really intended to meet the requirements of the Mahomedan law, or only ordinary expressions of a disappointed Bengalee purchaser. As the case is going back to the Lower Appellate Court, we think there ought to be a further direction to the Lower Appellate Court to consider and determine the question whether, under the Mahomedan law, the plaintiff was entitled to a right of pre-emption over all, or at least over one, of the defendants.

The costs of this appeal will follow the result.

PRIVY COUNCIL.

THE 5th MAY, 1874.

Appeal from the Madras High Court.

CHEDAMBARA CHETTY,
versus

RANGA KRISHNA MUTHA VIRA
PUCHAIYA NAICKAR.

Champerly and Maintenance—Mofussil Courts.

Although the law of champerly is not a law applicable to the Mofussil, the Courts would be exercising a very unsound discretion, and acting on a very erroneous principle, if they were to allow a stranger to interfere in family matters, by an agreement between him and the real heirs that if he should establish their claim he should be entitled to a share of the estate; and that such an agreement could not be enforced, being something against good policy and justice, something tending to promote unnecessary litigation, and something that in legal sense is immoral.

The statement of the following facts seems necessary:—

The respondent was the younger brother of the late zemindar, or polligar, of Marungapury. He seems to have been treated as heir presumptive by his brother. Immediately upon his brother's death he was recognized by the authorities as the zemindar; and, being a minor, he and his estate were placed under the guardianship of the Court of Wards. His brother's widows for two years acquiesced in his recognition by the Govern-

ment as heir and received at the hands of the Collector, who was exercising the power of the Court of Wards, certain sums by way of maintenance. In December 1866 a change came over them. The plaintiff in this suit then came upon the stage. The ladies determined to claim the estate as the heirs of the late zemindar on the ground of the illegitimacy of the respondent. An agreement was drawn between them and the plaintiff and among the other terms it was stipulated that they would do nothing in the suit or otherwise without his consent, and that they would pay him on demand the moneys to be advanced with interest; and further, that if they succeeded in the suit they would pay him a lac of rupees and a moiety of the surplus collections, mortgaging the zemindaree to secure those payments, &c. Under this agreement a suit was instituted in their names. The respondent, short time after, attained the age of majority and was made a formal defendant. The widows seem afterwards to have become desirous of settling and compromising their suit, and the terms upon which they were willing to compromise were finally embodied in a razeenamah. When the first negotiation for the compromise took place, there were present on that occasion not only the vakeels and agents of the nominal parties to the suit, but certain persons acting on behalf

of, or as agents for, the appellant ; the latter contended that the compromise could not be carried into effect without their principal's consent, that a large sum of money was due from the ladies to him ; they made use of threats to the respondent to the effect that unless he would make himself liable for moneys to the amount of Rs. 62,000, the consent of the plaintiff to the compromise would be refused, that the case would go on, and would probably terminate in the loss of his zemindari. A note for Rs. 62,000 was given by the respondent in consequence of these threats. Subsequently the plaintiff asserted that Rs. 62,000 was not a sufficient satisfaction of his claims, and that he must have Rs. 67,000. He threatened, if his demand was not acceded to, not only to go on with the pending suit, but also to sue on the note of hand for Rs. 62,000. The respondent under pressure of these and other threats was induced to execute the bond for Rs. 67,000. The present action was on that note.

Their Lordships in delivering judgment said :—

With respect to the law of champerty, or maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in India is not the same as it is in England. The statute of champerty, being part of the statute law of England, has of course no effect in the Mofussil of India ; and the

Courts of India do admit the validity of many transactions of that nature, which would not be recognized or treated as valid by the Courts in England. On the other hand, the cases cited show that the Indian Courts will not sanction every description of maintenance. Probably, the true principle is that stated by Sir Barnes Peacock in the course of the argument, *viz.*, that administering, as they are bound to administer, justice according to the broad principles of equity and good conscience, those Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bona fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt or other improper motive. Now, looking at all the facts of this case, their Lordships think it is extremely doubtful whether the plaintiff could have recovered on this agreement if the question had arisen between the widows and the plaintiff after he had got the estate for them ; whether, upon the principles laid down by Chief Justice Peacock and cited by Mr. Justice Kemp in the case in the 13th Weekly Reporter, the Courts might not have refused to enforce such an agreement. The principle laid down by the learned Judge was that although the law of champerty was not a law appli-

cable to the Motussil, the Courts would be exercising a very unsound discretion, and acting on a very erroneous principle, if they were to allow a stranger to interfere in family affairs, by an agreement between him and the real heirs that if he should establish their claim he should be entitled to a share of the estate. Nor, in holding that such an agreement could not be enforced, would the Courts, as it seems to their Lordships, be running counter to what was decided by this Committee in the case of *Fischer v. Kamala Naicker*,* for the judgment there assumes that if the agreement is something against good policy and justice, something tending to promote unnecessary litigation, something that in the legal sense is immoral, it cannot be supported. But it is not necessary for their Lordships to decide a question which has not arisen, viz., what would have been the rights of the appellant as against the widow. It is sufficient for them to say that they are dealing with a person who had got up, or at all events intervened in, a suit with which he had no necessary concern; who had made himself *dominus litis* in that suit, and had acquired over the plaintiffs in it the power of preventing them from doing what they felt to be right and just; and from interested and corrupt motives was exercising that power. The zemindar must

be taken to have been the legitimate heir; and even if the widows had *bond fide* entered into the litigation to dispute that legitimacy, it is perfectly clear that at the time when this transaction took place they had come to a better mind, and had satisfied themselves that the right thing as regarded the boy and as regarded the family was to acquiesce in his title, to admit his legitimacy, and to allow him to remain zemindar.

Their Lordships think it would be contrary to every sound principle of justice and of policy to permit a person who had acquired this sort of irregular interest in a suit,—and a power which cannot be safely conceded to any speculator,—to make his power of preventing a family arrangement so just and proper from being carried into effect, the means of extorting a large sum of money from the person whose title had been unjustly challenged? The case, however, does not rest here. The transaction was not one entered into between two persons, each of whom was capable of taking care of himself. Here was a boy of 18 without proper counsel or assistance, for such of his servants as gave him any advise thought with him that he should do nothing until he could see the Collector; and his vakeel, who is represented as his legal adviser in the matter, disowns having given him any counsel, and has

* 3, W. R., P. C., 33.

been treated as having failed in his duty in refusing that counsel. There is, moreover, clear evidence that he was threatened with the consequences of not immediately acquiescing in the plaintiff's demand; that these threats were addressed by a powerful man to a boy, and were therefore likely to disturb his mind and render him incapable of acting as a free agent. Whoever has had to do with litigation in India must know that such threats are of far greater weight there than they would be in this country. This suit was one in which the legitimacy of the respondent was called in question; and the person threatening was a person conversant with law-suits,—a person of great wealth and great power, and we all know how easy it is in India, upon such an issue as that, to get up any amount of false evidence, and that it is not because a man has a true case that he is sure to bring it to a successful issue. Their Lordships think the Judges of the High Court have rather understated the case when they treated the threats as threats only of consequences perfectly legal; for (putting aside the threat as to suing on the note for Rs. 62,000, which is not so satisfactorily proved as the others) they think that the threats proved may well be taken to be threats of carrying on the litigation against the respondent *per fas aut nefas*. In any case they were threats which over-

came his free-will, and induced him, contrary to his own judgment and his own sense of right, and without any evidence that any such sum as was claimed was due, to execute the bond extorted from him.

That being their Lordships' view, they think that the Court below was right in holding that the bond cannot stand against the respondent. It is not necessary to go into the question which has been argued on both sides as to the power of the Court to make the bond stand as a security for what may really have been advanced. It is not necessary to consider whether in a suit brought to enforce a fraudulent deed against a person from whom something is justly due, a Court of justice ought to exercise the power of saying that such a deed shall stand as security for what is really due; because in this case, but for the bond which was thus extorted from him, nothing was ever due from the respondent to the appellant, and there existed no privity of contract between them.

Upon these grounds their Lordships think that the decisions of the Courts below, now under appeal, were right, and they must humbly advise Her Majesty to affirm them, and to dismiss this appeal, with costs.

CALCUTTA HIGH COURT.

*The 12th May, 1874.*The Hon'ble J. B. Phear and G. G. Morris,
*Judges.*BIKAN SINGH and others (Defendants) *Appellants,*
*versus*MUSSAMUT PARBUTTY KOOER and
others (Plaintiffs) *Respondents.**Conveyance by Party not in Possession.—Right of Suit.*

A person who has purchased property from a party who was not in possession at the time of sale, but who was in possession and enjoyment before he was ousted, has a right of suit against the party who ousted his vendor.

PHEAR, J.—(In delivering judgment said)—It seems that, according to the statement of facts made in the plaint, the cause of action accrued to Parbutty Koor herself some time before the suit was brought, and that while she was out of possession of the property which she now seeks to recover (probably for the purpose of obtaining necessary funds to carry on the suit), she sold a share in that property and certain rights of suit to the plaintiffs who have been spoken of as plaintiffs 3, 4, and 5, and it is urged that, according to decisions of this Court and of the Privy Council, persons in the situation which these last-mentioned plaintiffs thus came into do not thereby obtain a right of suit for the recovery of the immediate possession of the land. We have been referred on this point to the

case reported in the XXI. Weekly Reporter, p. 101, and to the cases decided in the Privy Council and in this Court which are cited in that report. But in all those cases we find that the property which was the subject of conveyance had never before the date of the conveyance been in the possession and enjoyment of the person who professed to convey it. And the Courts held that under the circumstances of those suits the conveyance did not of itself operate to pass a right to sue alone for the immediate possession of the property, and that it was at least essential to such a right that the vendee should be in a position to claim specific performance of the contract of conveyance from his vendor. The facts of the present case are different, because both the Courts below have found that Parbutty Koor had been in possession and enjoyment of the property which is the subject of suit for some four years before she was wrongfully ousted from the property by the defendants in the way she alleges in her plaint, and she herself in her plaint states that she has effectively given a share of the property to her co-plaintiffs. And we have in the decisions reported in the XI. Weekly Reporter, p. 134,* and in the

* 11, W. R., p. 134 —(C. H. C., L. S. Jackson and W. Markby, J.J.) 12th February 1869, Kumur-ooddeen Shah. "The Lower Appellate Court has dismissed the plaintiff's claim *in toto*, on the ground that when Goburdhun and Rohcem executed the convey

same volume, p. 80,† precedents tending to show that a conveyance of property under circumstances similar to those alleged in the present plaint, give the person to whom the conveyance is made a right to sue for the immediate possession of the property.

In our opinion the present case does not fall within the principle which was laid down by the Privy

ance to the plaintiff in 1272 they were not in possession. This mode of disposing of the case cannot be supported. Persons having a right of possession may dispose of property though it is not actually in their possession."

† 11, W. R., p. 80—(C. H. C., *Sir Barnes Peacock, Kt., Chief Justice*, L. S. Jackson and A. G. Macpherson, *Judges*) 8th September, 1868—*Prankristo Dey*. In this case the question before the Court was "whether a lessee whose lessors have never been in possession of the lands comprised in the lease, can bring an action to establish the title of his lessors, who are made by him co-defendants in the suit along with the defendants in possession." The Chief Justice in delivering judgment said—"The lease gave to the plaintiff a right of possession, assuming that the lessors had a right of possession but were not in possession. If they transferred the right which they had to the lessee, and the lessee was kept out of possession by the defendants, the lessee had a right of suit against the defendants to recover the possession from them. If the lessors had no right of possession—as for instance, if they were barred by limitation—they could not convey to the plaintiff that to which they themselves were not entitled, and the suit would, of course, fail on the ground that the lessors had nothing which they could convey. It is said that the lessors ought to have been made co-plaintiffs, but the Courts cannot compel a man to become a plaintiff against his will."

The decision in 2, W. R., p. 138, overruled,

Council and followed in the cases reported in the XXI. Weekly Reporter, p. 101. But even had we thought otherwise, it still would be a question here whether we ought to interfere upon special appeal, because we ought not on special appeal to give effect to an objection made against the decision of the Lower Court, unless that objection be of such a kind as to satisfy us that there has probably been a failure of justice consequent upon the decision passed by the Lower Court.

Now it must be borne in mind that in the present appeal no objection whatever is made to the decision of the Lower Appellate Court upon the merits of the case. And the finding of that Court is that the defendants wrongfully ousted the plaintiff Parbutty Koorer from the possession of the property in suit to which she was of right entitled, and of which she had been previously in the quiet possession and enjoyment. This being so, and the decree for recovery of possession as against the defendants having been made in her favor, it can be in no way, so far as we can perceive, of any prejudice whatever to the defendants that the persons to whom Parbutty Koorer has by her own account conveyed a share of this property should be joined with her as co-plaintiffs. We must take it that she has an undoubted right under this decree as against the defendants to have the possession and

dominion over this property. And this being so, the co-plaintiffs who, by her own solemn affirmation made in the plaint, are persons to whom she has conveyed a share of this property, are entitled as well against her as against the defendants to obtain a specific performance of their contract with her. And it would serve no end of equity or good conscience, as far as we can see, to interfere with the decree

which has been made by the Lower Court by excluding from that decree the names of Parbutty Kooer's co-plaintiffs as judgment-creditors.

On the whole, we are of opinion that there is no good ground shown to us on this appeal for our disturbing the decision of the Lower Appellate Court. And accordingly the appeal is dismissed with costs.

BOMBAY HIGH COURT.

The 25th September, 1873.

FULL BENCH.

Before Westropp, C. J., and Melvill, West,
Pinhey and Nanabhai Haridas, J.J.

REG. *vs.* BAI RATAN.

*Act X. of 1872, Secs. 122 and
346—Confession of accused not
signed by him—Oral Evidence to
prove it.*

The confession of an accused person, taken by a Magistrate having no jurisdiction to commit or try him, is imperfect, if not signed by the accused person or attested by his mark, and is inadmissible in evidence (Sections 122 and 346, Act X. of 1872.)

The term "Preliminary Inquiry" in the final clause of Sec. 346 means such inquiries as are the subject of Chapters XIV. (of Inquiries and Trials) and XV. (of Inquiry into cases triable by the Court of Session or the High Court); and, therefore, that clause does not apply to confessions recorded under Sec. 122, which refers to an inquiry not during a trial or one held with a view to committal, but an inquiry for the purpose of forwarding confessions, when recorded, to the Magistrate by whom the case of the accused person is inquired into or tried. Consequently, when a confession taken under Sec. 122 is inadmissible in evidence, oral evidence to prove that such a confession was made or what the terms of that confession were, is inadmissible also (Sec. 91 of the Indian Evidence Act.)

The accused, Bái Ratan, was tried along with her paramour, Dádábháí, for the offence of murder by H. M. Birdwood, Session Judge of Surat. Dádábháí was acquitted, but Bái Ratan was convicted and sentenced to death.

The proceedings having been submitted by the Session Judge for confirmation of sentence and an

appeal having also
the case was heard
and NANABHAI HARA

It appeared during that the conviction of Bái Ratan was based solely on her own confession, taken by a Second Class Subordinate Magistrate not empowered either to try or commit the accused for trial, which confession was neither signed by her nor attested by her mark.

The Division Bench, entertaining doubts as to the admissibility in evidence of this confession, referred four questions for the decision of the Full Bench, with the following remarks:—

The appellant, Bái Ratan, has been convicted of the murder of her husband, Jai Nathu, and sentenced to death.

She was tried together with her paramour, Dádábháí, and the Assessors found both the prisoners guilty, but the Session Judge acquitted Dádábháí on the ground of the insufficiency of the evidence. Against this judgment of acquittal, the Government has not appealed.

It is proved that Jai Nathu died from the effect of arsenic administered to him in his dinner.

Bái Ratan, while in custody of the police, made a statement in the presence of a Magistrate (not the committing Magistrate) which was reduced into writing.

At the trial, Dádábháí's pleader objected to the admission of the document because it had not been

signed by Bâi Ratan. The Session Judge overruled the objection on the ground that the Magistrate, by whom the confession had been recorded, deposed that it had been duly made.

A child of Bâi Ratan and the deceased has given confirmatory evidence as to most of the circumstances mentioned in the confession. There is nothing in his deposition which carries the case against Bâi Ratan further, except a statement that on the night in question, she, contrary to her usual custom, cooked her husband's dinner separately from that of the rest of the family. This statement was disbelieved by the Session Judge, but we see no sufficient reason for rejecting it. There is no other evidence against Bâi Ratan.

The Session Judge's reasons for convicting Bâi Ratan are set forth in the following extract from his judgment:—

“Bâi Ratan admits that a criminal intimacy had existed between her and Dâdâbhâi, and that she left her own house, at the summons of Dâdâbhâi, and went to meet him in a neighbouring village. She admits that she saw Dâdâbhâi mixing poison in her husband's dinner, and that she remained silent. She knew, according to her own admissions, that it was Dâdâbhâi's intention to take her husband's life; for she says, in her statement, that Dâdâbhâi had promised to give the Bhil from

whom he had obtained the poison, Rs. 50, on the dead body of her husband coming out of her house. When she called in a neighbour early in the morning of the 30th April, she did not tell him what had happened, and it was not till after sunrise on that day that she says that she tried to administer an antidote, and then her husband's case was hopeless.

“Her excuse for her silence is that she was afraid of Dâdâbhâi. But, as Jai Nathu's wife, she was bound to speak when she saw him eating poison which she knew would kill him.

“By her silence, then, and by her failure to use any prompt remedies after Dâdâbhâi had left the house, she caused Jai Nathu's death. She was guilty of an ‘illegal omission,’ and as, under Sec. 32 of the Indian Penal Code, words, which refer to acts done, extend also to omissions, the word ‘act’ as used in Section 299 of that Code, would apply to Bâi Ratan's conduct as it was described by herself on the 6th May last.

“She did not admit any such intention as is contemplated in the first three clauses of Section 300, but under the circumstances, as admitted by herself, she must have known that her illegal omission was ‘so imminently dangerous that it must in all probability cause death’ (Clause 4 of Section 300), and she was guilty of the omission, ‘without any excuse for

incurring the risk causing death; for fear of Dādābhāi was not, under the circumstances, any excuse—(see Section 94 of the Indian Penal Code).

“Bāi Ratan can, I am of opinion, be properly convicted, on her own past admissions, of the offence of murder.”

The points of law, on which we desire to have the advantage of a decision by the Full Bench, are the following :—

1. Whether the statement or confession is admissible in evidence, the same not having been signed by Bāi Ratan ?

2. If that document be not admissible, whether oral evidence is admissible to prove that a confession was made by Bāi Ratan, and the terms of such confession ?

3. Whether the statement or confession amounts to a confession of murder, or of any other offence ?

4. Whether, regard being had to the circumstance that Dādābhāi has been acquitted, Bāi Ratan can be legally convicted, on the evidence above stated, of murder or of any other offence ?

The judgment of the Full Bench was delivered on the 18th September 1873 by—

WESTROPP, C. J.:—Four questions have been submitted to the present Full Bench by the Division Court.

Of these the first is: “Whether the statement or confession of the accused Bāi Ratan is admissible in

evidence, the same not having been signed by her?”

This question depends upon the construction of Sections 122 and 346 of the Criminal Procedure Code, and upon the extent to which the latter section is applicable to the confession made under the former section.

Those sections are the substitutes for the latter part of Section 149 and for Section 205 of the late Criminal Procedure Code, neither of which contained any provision as to the accused signing the confession made by him or his examination.

With Section 205 of that Code, the Courts required a strict compliance. *Reg. v. Mussamut Nirani* (*), *Reg. v. Bhikarce* (†), *Reg. v. Timmi* (‡), *Reg. v. Kallā* (§), *Reg. v. Perādi* (¶), *Reg. v. Vithoj* (§), *Reg. v. Ganū* (*). In some of the last-mentioned instances, the Court remanded the cases in order that the evidence of the writer of the alleged confession or of some other person present might be taken to prove that it had been made, the record of it being inadmissible on account of its want of accordance with the requirements of Section 205.

* 7, Cal. W. R., Cr. R., 49.

† 15, *Ibid.*, 63.

‡ 2, Bom. H. C. Rep., 125, 2nd ed.

§ *Ibid.*, 295.

¶ *Ibid.*, 397.

§ *Ibid.*, 398.

* *Ibid.*, 399.

In *Reg. v. Vāhālā Jethā* (*), it was held that the words "a Magistrate" in Section 149 of the same Code mean "any Magistrate," and, therefore, that although the practice of taking prisoners before a Magistrate, not having jurisdiction to try or commit for trial, for the purpose of having a confession recorded, was not generally desirable, yet such a confession was legally admissible.

The new Code, adopting that decision, has, in its 22nd and 122nd sections, expressly authorized any Magistrate to record a confession of the accused. The final clause in Section 45, renders such confessions, as that section relates to, admissible in evidence in all subsequent proceedings.

The confession of Bāi Ratan has been recorded by a Second Class Magistrate, who has not original jurisdiction either to commit or try such a case as the present, and who was not deputed under Section 115, by a Magistrate having jurisdiction, to hold a preliminary inquiry or otherwise to dispose of it. Accordingly, the Second Class Magistrate only recorded the confession, the matter having been brought before him previously to the inquiry held by the committing Magistrate.

Section 122 of the new Criminal Procedure Code especially treats of such confessions. It is to be

noted that it is part of the Chapter (X.) relating to "investigation" by the Police, which is carefully distinguished in the glossary of the Code (Section 4) from "inquiry" by a Magistrate or Court; and that Sections 21 (cl. 7) and 22 (cl. 2.) describe such confessions as confessions "during a Police investigation."

Section 122 enacts that "Any Magistrate may record any statement made to him by any person, or any confession made to him by any person accused of an offence by any Police Officer or other person. Such statements shall be recorded in the manner hereinafter prescribed for recording evidence, and such confession shall be taken in the manner provided in Sections 345 and 346, and shall, when recorded, be forwarded to the Magistrate by whom the case is inquired into or tried." Pausing here, it is, with especial reference to the concluding passage in Sec. 346, important to remark: 1st—that Sec. 122 only provides that the confession "shall be taken," (and not that it shall also be otherwise dealt with, or its defects, if any, supplied,) "in the manner provided in Sections 345 and 346;" 2ndly—that the taking of such a confession is clearly distinguished in Sec. 122 from the inquiry into the case, because that section provides that when the confession is recorded, it shall "be forwarded to the Magistrate by whom the case is inquired into or

* 7, Bom. II, C. Rep., Cr. Ca., 56.

tried." The same section then proceeds thus: "No Magistrate shall record any such confession unless, upon inquiry, he has reason to believe that it was made voluntarily, and he shall make a memorandum at the foot of any such confession to the following effect: 'I believe that this confession was voluntarily made.'

(Signed) A. B.,
Magistrate."

The inquiry, spoke of in this latter portion of Sec. 122, is not an inquiry into the case, but simply into the question whether the confession is voluntarily made.

Section 316, taken *per se*, would appear to apply only to examinations of the accused taken on inquiries (as distinguished from investigations) and trials. We find it in the sub-division of Chapter XXV, relating to "The examination of accused persons" which seems to be quite a distinct process from a statement or confession made during the Police investigation. Were this not intended to be so, Sec. 122 would have been superfluous.

Section 316 consists of five portions, which, for convenience of reference, we have marked with the letters (a), (b), (c), (d) and (e), and enacts that:

(a) — "Whenever an accused person is examined, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in

full, and shall be shown or read to him, and he shall be at liberty to explain or add to his answers.

(b) — "When the whole is made conformable to what he declares is the truth, the examination shall be attested by the signature of the Magistrate or Sessions Judge, who shall certify under his own hand that it was taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person.

(c) — "In cases in which the examination of the accused person is not recorded by the Magistrate or Sessions Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the vernacular of the District, or in English, if he is sufficiently acquainted with that language; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall be annexed to the record. If the Magistrate or Sessions Judge is precluded from making a memorandum as above required, he shall record the reason of his inability to do so.

(d) — "The accused person shall sign or attest by his mark such record.

(e) — "If the examination be taken in the course of a preliminary inquiry, and the Court of Session find that the provisions of this section have not been fully complied with, it shall take evidence

that the prisoner duly made the statement recorded: Provided that, if the error does not prejudice the prisoner, it shall not be deemed to affect the admissibility of the statement so recorded."

For the Crown it has been argued that this 346th section contemplates two cases: 1st—where the examination is taken down in the handwriting of the Magistrate or Sessions Judge himself, and is signed by him; 2nd—where it is taken down in the handwriting of another person in the presence of the Magistrate or Sessions Judge, but is signed by the Magistrate or Sessions Judge; in which second case he is required (if able) to make the memorandum mentioned in clause (e); and that the signature or mark of the accused, mentioned in clause (d), is required only in the second case, inasmuch as the confession, not being written by the Magistrate or Sessions Judge himself, stands in greater need of confirmation of its accuracy by the signature or mark of the accused, than in the first case, when it is written by the Magistrate or Sessions Judge personally.

We do not concur in that argument.

Were we to refer the phrase "such record" in clause (e) to its immediate antecedent, the record, which the accused person would be required to sign, would be that of the inability of the Magistrate

or Sessions Judge to make the memorandum enjoined in clause (d). To attribute such an intention to the Legislature would be absurd. Moreover in Secs. 333, 334, and 335, where a similar memorandum is required, no special safeguard is provided. Whether the examination is written down by the Magistrate or Sessions Judge himself, or by some other person for him, and in his presence and hearing, the record of it must be shown or read to the accused person, who has in either case an equal opportunity of explaining or adding to his answers; so that we see no greater reason for requiring his signature to it in one case than in the other. The reason for requiring that signature was probably the same in both cases, namely, to furnish a new and strong test whether the confession was voluntary and free from controlling influences, and to afford him a *locus penitentie*—an ultimate opportunity, before the final completion of the record, of indicating that the confession was not voluntary, or was made under improper influence, if such were the case, and also an additional opportunity of denying the accuracy of the record of that confession.

We think, too, that if the Legislature intended that the signature of the accused should be required to the record in the event only of its having been written by some person other than the Ma-

gistrate or Sessions Judge, it would, as it easily might, have expressly said so.

It follows from this that, in our opinion, the confession in the present case was defective for want of the signature of the accused. The error of the Second Class Magistrate, in omitting to ask her to sign, was, having regard to the probable intention of the Legislature in requiring the signature of the accused, of such a nature as may have seriously prejudiced her, and, therefore, as we think, rendered the thus imperfect record of the confession inadmissible in evidence against her. See *Reg v. Mussamat Niruni* and *Reg v. Bhikaree (supra)*.

It remains, then, to be decided whether this error can now be rectified; and, in considering that question, we should consider also the 2nd point submitted to us by the Division Court, viz: "If the document be not admissible, whether oral evidence is admissible to prove that a confession was made by Bâi Ratan, and the terms of that confession?"

The 91st section of the Indian Evidence Act. (I. of 1872) enacts that: "When the terms of a contract, or grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the

terms of such contract, grant, or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

Then follow some exceptions and explanations not bearing upon the present case.

With a full recollection of Sec. 65, cl. (e) and of Section 74 of the same Act, we must say that this does not appear to us to be a case in which secondary evidence of the contents of the original confession would be of any avail. The primary evidence is itself forthcoming, and has been produced, and secondary evidence of its contents, whether such secondary evidence is a copy or oral evidence of its contents, would, if full and accurate, disclose the defect in the original record, namely, the absence of the signature of the accused, and the case would, accordingly, remain precisely in the same condition as it now is.

The provision in Sec. 91 of the Evidence Act that "in all cases in which any matter is required by law to be reduced to the form of a document," no evidence shall be given in proof of such matter except the document itself, must, accordingly, be regarded as an objection fatal to the adoption of the course, very justly sanctioned, before the passing of the Evidence

Act of 1872, in the cases in Vol. 11, Bombay High Court Reports, pp. 395 to 399, already mentioned (*i. e.*, remanding the case in order that oral evidence of the writer, or some other person or persons, present when the confession was made, may be taken as to what the accused then said, and as to the circumstances under which he said it), unless the final clause in Sec. 346 of the Criminal Procedure Code is applicable to confessions taken under Sec. 122 of that Code. If it be so, it would, as well because it is a special, as because it is a later enactment, override Sec. 91 of the Evidence Act, and evidence might be taken by the Session Court that the prisoner (accused) "duly made" a confession to the same effect as that recorded. By "duly made" is probably meant made in such a manner as not to be rendered inadmissible by Secs. 24, 25, or 26 of the Evidence Act, or Secs. 119, 120, 121 of the new Criminal Procedure Code. [The same remark would apply to those words in the ultimate clause in Sec. 45 in that Code.] It has already been remarked that there is nothing in Sec. 122 of that Code which *per se* would have the effect of rendering the final clause of Section 346 applicable to confessions recorded under Section 122. The last-mentioned section simply prescribes that confessions shall be "taken" in the manner prescribed in Sections 345 and 346, but is silent as to the mode, if any, in which irregularities may be cured. The question, then, is whether the language in the final clause of Sec. 346 is, of itself, sufficient to include confessions under Sec. 122. We are of opinion that it is not. The examination spoken of in the final clause of Sec. 346 is an "examination taken in the course of a preliminary inquiry." It should be noted that the term used is not "inquiry" simply. Were it so, the description of that term given in the Glossary (Sec. 4) might be resorted to, though we are not now prepared to say positively that we could regard the recording by a Magistrate (without power to commit for trial or to try) of a confession under Sec. 122 as an inquiry within Sec. 4. By the term "preliminary inquiry," which is the phrase employed in the final clause of Sec. 346, we understand such inquiries as are the subject of Chapters XIV. and XV of the new Code. The phrase "preliminary inquiry" actually occurs in Secs. 115, 346, 357 and 471, and in the margin to Sec. 183 only; but the context shows that, in the majority of cases in which "inquiry" is mentioned, it means inquiry by the committing Magistrate. The examination of the accused, taken in the course of preliminary inquiry mentioned in Sec. 346, is the examination taken during such inquiry by the Magistrate under Sec. 193, and

rendered admissible in evidence by Sec. 248. The distinction between examination and confession is plainly drawn in the two last clauses of Sec. 45.

It is worthy of notice that the power to take evidence, *aliunde*, of the examination of the accused, when the record of it is irregular, is, by Sec. 346, intrusted to the Court of Session only. So that in the case of such a record, as that in the present case, of the confession of the accused being forwarded to a Magistrate having jurisdiction to commit or try, he could not remedy the irregularity by taking evidence, *aliunde*, of the confession.

For these reasons, we think that the first and second questions, submitted to us by the Division Court, must be answered in the negative.

It having been admitted by the Government Pleader that, without the confession, there is not sufficient evidence to sustain the conviction, and that too being, as we are informed, the opinion of the Division

Court, Sec. 167 of the Evidence Act is not applicable here, and, for the same reason, it being impossible to maintain that the accused has not been prejudiced in her defence by the improper admission of the confession at the trial, Sec. 283 of the new Criminal Procedure Code is also inapplicable. Hence our answers to the first and second questions must be fatal to the conviction, and it becomes unnecessary for us to answer the third and fourth questions.

This case has been well argued on both sides, and we are especially indebted to Mr. Ghanashám Nilkant, who has generously volunteered his valuable services on behalf of the accused. She would otherwise have been *inops consilii*.

The case is remitted for final disposal to the Division Court.

25th September, 1873. On this day the Division Bench (MELVILL and NAXABHAI HARIDASS, JJ.) directed the accused Bā Ratan to be acquitted and discharged.

MOFUSSIL COURTS OF FIRST INSTANCE.

WE take the following instructive remarks on the imperfections that attend the process of trial in most Courts of first instance in the Mofussil, from a very able paper on *Some Features of Litigation in Bengal*, read by Mr. Justice Phear a year or two ago before the Social Science Association in Calcutta. The remarks seem to us so calculated to arrest the attention of those for whom they are chiefly intended, that we make no apology for giving them a place in our columns.

The course of a trial between parties in an English Court of Justice is not an arbitrary proceeding; it must be pursued according to a somewhat strict rule which in all its parts is founded on reason, and has been dictated by the accumulated experience of many generations of highly trained men. In the first place, the case of each litigant party must be stated clearly and concisely in writing. From these statements the questions of fact or law, upon which the parties are at issue, should be singly framed. By this means the parties are informed of the points which they are respectively called upon to establish or to meet by evidence. The trial, properly speaking,—i. e., the hearing of argument on behalf of the parties, and the taking of evidence,—commences after the issues have been definitely fixed, and it is *most important* that it should be carried

on continuously without a break before the same Judge until it is ended.

The order of the trial is, as a rule, that the party upon whom the burden of commencing falls, states his case, and produces *all* his evidence; then the opposite party or parties answers, and also, if necessary, states a counter-case and produces *all* his evidence; and finally the first party replies. Upon the evidence thus brought before it, the Court, aided by the discussion which has taken place, arrives at a conclusion as to the facts, and pronounces its judicial decision between the parties.

The primary purpose of the trial is that the Court should be clearly and correctly informed as to the relevant facts. Every precaution therefore must be taken to ensure that the evidence should bear upon those facts alone which satisfy this condition, and also should be the best available for the purpose of manifesting them. And in furtherance of this purpose, each party must have the fullest opportunity of objecting to, interpreting, explaining, or rebutting all evidence which is to be used against him.

Now all evidence of facts which have occurred may be put into one of two groups,—namely, either the testimony of witnesses relative to facts, which they have personally perceived, or all other evidence, of

which the principal is that afforded by written documents. The principle just enunciated leads to this immediate consequence,—namely, that no evidence belonging to the second group, which is not admitted by the party affected by it, should be used as evidence against him, until it is shown to be legitimate evidence as against him by the testimony of leaving witnesses,—*viz.*, until such facts with regard to it are proved by this testimony, as cause it to be legitimate evidence, and until he has had opportunity of explaining them. The principle also renders imperative a certain order in the examination of every witness. The party on whose behalf he is called must first elicit from him, by a series of non-leading questions, *all* the facts to which he can speak from personal perception, and which are relevant to the examiner's side of the case, including in them any facts which serve to make evidence of the documents intended to be used against the other side; also under certain circumstances the examiner must, in the same manner, get him to explain or controvert facts put forward by the other side. This is examination-in-chief, and is perhaps the most difficult part of an advocate's duty. Next, the opposite side, with which it is to be presumed as a rule the witness has no sympathy, cross-examines him; and this is so much the easier of performance, because the examiner

is not necessarily confined to questions which do not lead to the answer. The object of the cross-examination is manifold, as for instance, (*a*) to impeach the credit of the witness as a witness of truth; (*b*) to reduce his statements to their proper proportions, as the results of personal observation; (*c*) to bring out countervailing facts and facts favourable to the cross-examiner's side; (*d*) to give the witness the opportunity of answering and explaining relevant facts belonging to the cross-examiner's side with which he has any concern. Finally, the first side re-examines,—*i. e.*, without leading questions he gets the witness to place the newly elicited facts in the most favourable light for his side.

It is plain that the foregoing rules need for their effective operation that the persons charged with the duty of examining on behalf of the respective opposing parties should thoroughly know the case of these parties and the facts which the witnesses can depose to; and every question, or omission to question, must be attributed to the exercise of a discretion founded on that knowledge. When these conditions are satisfied, it may be safely asserted that the English mode of trial leads with much economy of time and a considerable degree of certainty to the facts, which may be depended upon *inter partes*.

All the Civil Courts in India conduct trials of questions of fact *inter partes* after the English manner. But it may certainly be averred that they never observe the **WHOLE** of the precautions which tribunals in England find it necessary to observe in order to reach the facts of a case, and I am afraid it must be said that they *generally* disregard the most important of them.

For example, it not seldom happens that the Judge who passes the decision in the Court of first instance is not the Judge who saw the witnesses give their testimony. Lately, a case came under my notice in which *four* Judges were concerned in the trial between the fixing of issues and the delivering of judgment; also a case in which there were in like manner as many as five—one had settled the issues, another had heard the case opened on behalf of one side, and taken the depositions of two or three witnesses, and so on, and the last determined the matter on perusal of the documents and depositions which his predecessors had in this way got together. Of course, under such circumstances as these, the judgment of the primary Court has been altogether unaided by that which is truly the surest of all guides to the truth between the parties, namely, intelligent observation of the demeanour of witnesses under proper examination, and of the course of the trial. In

most cases, though no doubt not in all, it is the unnecessarily protracted duration of the trial-proceedings which gives rise to the occurrence of a succession of Judges. Now, a trial, which is carried on, so to speak, by bits, after intervals of time, even if the whole of it take place before the same Judge, is a most illusory affair: as compared with a proper trial, it abounds with facilities for cloaking and colouring facts, and is deficient in testing apparatus. It is liable to degenerate into a struggle for advantage in which the most unscrupulous and influential has the best chance of winning. And for this reason where the practice prevails, there must, I apprehend, follow a demoralization of tone in the public feeling with regard to litigation. It cannot be too often repeated that the purity and the completeness of an English trial depend in large measure upon its being effected in one continuous sitting; and perhaps the most important element in it is the frank discussion by the parties face to face of the manner and the matter of the witnesses' testimony, following promptly upon its delivery at the closing of each side's case. Unfortunately, however, from various causes, the true value of oral evidence is not yet understood in Indian Courts, and little heed is paid to this part of the trial.

Also the art of examining is al-

most entirely unknown. I may say that it is essential both in examination and cross-examination that the testimony of the witness should be elicited by one who is well informed as to his own case, and therefore knows the material points upon which the witness can speak. So little is this regarded in India, that it is most common for the presiding Judge, who is necessarily ignorant of the original facts on either side, to conduct the principal part of the examination-in-chief of every witness! The reason usually given for this practice is that it affords the only means of preventing leading questions. But whether this be so or not (and I should say not), it seems to escape the notice of Judges that the results are just as vicious as would be those of leading questions. The vagueness, deficiency, and stereotyped form of the testimony-in-chief given by Judge-examined witnesses is generally such as to render it quite valueless. As a consequence of this practice, and also of ignorance of their business on the part of advocates in the Mofussil Courts, it is generally almost impossible to gather from a deposition whether a witness speaks to facts as of his own perception or not. And secondary and remote facts are brought out and fought over instead of the primary and immediate. It is difficult to give a true view of the extent to which this

prevails to any one who has had no personal experience of it.

I need hardly say that, if so little is known of proper examination-in-chief, almost less is known of cross-examination. This, such as it is, is generally confined to some feeble efforts at impeaching the witnesses' credit,—*i. e.*, to questions as to whether the witness is a relation or dependent of the party on whose side he appears, or whether he is not a professional witness, and so on: there is never any real attempt to cut down the evidence to the limits of personal observation, and seldom any to bring out favourable facts. And in no instance whatever have I seen a trace of consciousness in the cross-examiner of the obligation under which he lies, to disclose to the witness everything in which it was the intention of the other side to implicate him. I suppose no Mofussil vakeel ever put a document into the hand of his opponent's witness to enable him to give an explanation with regard to it. Yet this cross-testing of evidence, questioning of the witness of one side upon that which is said, or to be said, by the witnesses of the other, is of the essence of the trial-machinery.

Lastly, the mode in which documents are dealt with as evidence is most unsafe and apt to be misleading. In supposed pursuance of the provisions of the Civil Procedure Code, the parties *file* be-

fore trial almost all the documents which they propose to use at the trial; and it is the habit of the Courts to refer to any document so filed as if it were thereby made evidence without further proof. An Appeal Court will frequently, upon the footing of a document which it finds filed although it was never mentioned at the original trial, reverse the decision of the first Court! Now, it seems to be manifest without argument that no one's cause ought to be affected by evidence which he has had no opportunity of testing or refuting. Therefore, in order to render a document evidence it must be put forward at the trial in the presence of the opposite party, and unless its admissibility be then agreed to by him, it must be validated by the proof of such facts as suffice to make it admissible; and further, the opposite party must also be afforded fair opportunity of canvassing this proof and impeaching the effect of the document. To take a simple instance, if a ryot, sued by his zemindar for rent, relies upon a dakhila, or dakhilas, or farkhati signed by the zemindar's patwarri or other amla, his advocate should put the document into the hand of the gomastah or other principal witness of the plaintiff, and especially into the hands of the alleged signor (if he is called); and in the event of its not being then admitted, he must give such testimony in support of its authenticity as he

can independently; and this must be subjected to cross-examination before the dakhilas, &c., can be taken as evidence.

Not long ago, the highest authority in Bengal said in the most august assembly of India, that our judicial system is "rotten to the core." I think this expression is too strong. Our Judges, both European and Native, especially the latter, are in my opinion very respectable theoretical lawyers. On pure questions of law, their determinations are usually very correct. But by reason of want of information and training, they are generally deficient in the power of efficiently working the machinery of trial. They are unable to secure the production of evidence in a form which shall carry with it the means of gauging its value. It rarely happens that a record comes under my notice which does not afford an example of the total disregard by one or both litigant parties of the best and immediate evidence bearing on the cardinal points, and of the attribution to unproved documents of a false value. And I am forced to the belief that, in the majority of cases, the view of the facts upon which the decision rests is not accurate, often not even approximately so. All parties feel this, and the consequence necessarily is, appeal upon appeal as far as appeal will go. But of course, appeal does not really mend the matter:

the Appeal Court has it even less in its power than the first Court to extract the actual grains of fact from the mound of chaff in the shape of opinion, hearsay, and second-hand matter, which appears on the record, stated as if it were the immediate result of observation. It is painful to me in the extreme to observe that almost universally neither party to the suit seeks to elicit the primary facts upon which the case turns, and the Court never thinks of compelling them to do so. As an example, I may refer to a suit of considerable importance within my knowledge, in which the principal feature of the plaintiff's case was, that he and his predecessors in title had for eighteen years been in uninterrupted enjoyment of a 4-anna share of a certain mouzah : of the defendant's, that he and his predecessors had been for the same time in uninterrupted enjoyment of that same 4-anna share together with another 4-anna, making 8 annas in all. Now, one would think that here was a governing issue of fact between the contending parties which admitted of being proved the one way or the other in the most satisfactory manner. The collections must have gone to some body during those long years, and their course could have been traced with absolute precision. The parties were rich, and the contest well fought. A cloud of witnesses were called on both sides,

ryots, tehsildars, gomastahs, patwarries, ticcadars ; and yet (it seems scarcely credible), not one of them was either on examination or cross-examination made to state the occurrence within his observation of a single specific fact with regard to the collections and the payment of them. Not a ryot was made to say to whom he paid his rent during the different periods of time, not an amla was asked to state his practice during those years in making the collection, and to show by his books what he did with the money. Not a single witness was cross-examined relative to counter-statements affecting his own statements, or as to the situation of witnesses on opposite side. In the end the case came to be decided pretty much upon some such material as the following, heaped up on both sides alike :—

“ I know that the plaintiff and his ancestors have all along from before possessed a 4-anna share of the property in dispute. I and my father have, for the last seven years, cultivated three beegahs two cottas in Mouzah : therefore I know. Last year I paid rent to patwarri A. B., before that to C. D.

“ I was appointed patwarri of mouzah seven or eight years ago. Tehsildar E. F. appointed me. Plaintiff and his ancestors have all along been possessed of a 4-anna share. I have books. I left them at home. I have filed copies of jumma-bandi papers for the years

— and —. My brother made them. He is dead.”

It is obvious that any amount of stuff of his character affords no real guide to the specific facts which require to be ascertained. I could repeat examples of this sort almost without end. In a comparatively unimportant suit the question was, to what share of *ijmalli* property was the plaintiff (a widow) entitled; and everything turned upon the distribution of the collections which had obtained. I give an abstract of the depositions made by the witnesses for the plaintiff:—

No. 1. Plaintiff has a 3-anna odd share. I hold a *howdabati* tenure. I pay 1 anna odd to the 16-anna *malick*. Don't know how much to plaintiff.

No. 2. I know disputed land. Plaintiff owns 3 annas and odd, &c., &c. I saw a *ryot*, who is gone to another *zemindary*, make up accounts according to that share. I saw *gomastah* realize for plaintiff according to that share.

No. 3. Plaintiff is in possession of 3-anna odd share by receipt of rents according to inheritance, &c. I collected, and so can say. Plaintiff is in possession of the disputed land.

No. 4. Plaintiff realized 3 annas odd from my brother. I know that.

No. 5. Plaintiff has 3-anna odd share. I live in another part of the *talook*, and therefore I know she holds that share. She has possession by receipt of rent.

The witnesses of the other side spoke in like fashion, so that the real point of the case was never touched in any way; and the determination of the issue between the parties was little better than guess-work on the part of the

Court prompted by apparent probability.

It is often said that in India the parties of design avoid the critical facts, and that the Courts are not in fault in this matter. But this appears to me very much of the nature of the workman's excuse when he quarrels with his tools. And the truth is that in both the cases I have instanced, and in almost every other case that I have yet known during an experience of nearly nine years, the witnesses before the Court could have given valuable evidence directly in point, if they had been properly examined, and would have done so, had the Court known its business and done its duty. Indeed, how far the Courts generally are from understanding the true meaning and object of trial procedure may be perceived from such a fact as the following, namely:—A question is put to a witness by way of cross-examination, and the Court overrules it on the ground that, “as this witness is not a witness on this subject, the question cannot be put.” Instances of this kind are continually occurring, furnished as well by English as by native Judges. The misleading cause, no doubt, is that a party, applying for a summons to a witness, is obliged to specify the part of his case, which he desires the witness to support.

I will however give an instance of a trial effectively had in the

Mofussil under somewhat exceptional circumstances. The plaintiff was a shareholder of a certain tenure, and sued a ryot, one A, for his share of the rent, alleged to be payable according to the nature of the crop grown, and due, say, for the years 1276 and 1277 F. S. The plaintiff's gomastah deposed somewhat as follows :—

“Ever since 1273, I have seen defendant holding and cultivating the lands.

“These lands have continued unchanged; they pay rent according to the crop :—

Rs.	As	P.	
0	13	0	for amun and aus (rice).
0	9	6	mustard seed.
0	6	6	cheena.
1	2	0	safflower.

“Amins go and see each crop. One goes in Joistee, another in Agrahun, and notes in writing what has been raised in each field.

“The hissab has not been filed.

“Paddy is sown, some in Falgoon or Magh, and the rest in Kartic.

“Mustard in Agrahun, and is cut in Falgoon.

“Maskalye is sown while the paddy is growing, or afterwards, and is cut, &c.

“Safflower is sown in Kartic or Agrahun, and is gathered in Falgoon.

“I don't remember what were the crops raised on A's (defendant's) land in 1276 or 1277.

“The rent-account according to crops is made by amla with the ryots for the past year at the beginning of the next.

“Defendant made up the account for the three years in Bysakh 1278.

“I made the account on behalf of the zemindar.

“It was made from the chittas, which were written by the amins in Joistee and Agrahun.

“By that chitta 4 rupees 4 annas became due from A (defendant) for the three years for plaintiff's share.”

This witness was carefully cross-examined, and made to distinguish the material facts to which he could venture to speak as of his own personal observation from the rest; and these reduced themselves pretty well to this,—namely, that the defendant in witness's presence inspected the amin's chittas, and agreed that 4 rupees 4 annas was due from him on the footing of them to the plaintiff. He was made to give his reasons for the non-production of the amins, of their chittas, and of the proper account which defendant had agreed to, for none of these were produced; and also to describe the principal circumstances in regard to time, place, and occurrence under which the agreement was come to on the part of the defendant.

Witnesses (three or four) were called to corroborate the gomastah as to the customary rates of rent according to crops payable for lands, such as the lands held by the defendant, and also as to the alleged settlement of accounts come to by the defendant, the latter being the cardinal point of the case as it was shaped by the plaintiff. These, too, were each carefully cross-examined and got to detail the facts relative to the stating of accounts. Their stories proved in

the end to be hopelessly discordant; and further, on being presented with the versions of their colleagues, they boldly contradicted them in more than one particular; so that it became unmistakeably apparent that this men never had been present at any settlement of accounts by the defendant, such as they were brought to prove, and the plaintiff's case was fictitious on the showing of his own witnesses. And in truth no suit would ever have been brought on such a basis as this was, had the party any reason to anticipate that his evidence would have been subject to the process of analysis and sifting which it had to undergo: for although an *alibi* may, for want of something better, be relied upon alone as matter of defence, no man in his senses would make a like foundation his sole ground of suit. On the other hand, had this evidence in this case been taken in the ordinary fashion, the depositions on the two sides would have looked equally well, and have been equally vague; and the Court, in order to decide between them, would have been driven to the expedient of taking some accidental criterion, such as apparent respectability of witness and so on.*

The mischief resulting from the

* We may assume as a not improbable reason for the plaintiff bringing this, so to speak, fictitious suit, that he had some three or four years before bought a share of the mouzah at an execution-sale as a speculation: that he had failed to get hold of the collection papers or books, or other necessary

inefficient examination of witnesses and conduct of the trial does not end with the element of uncertainty which it introduces into the case tried. The morality of the community is in a measure affected by it. When the testimony of witnesses is not pinned at once to definite statements of facts of observation, and subjected to collateral tests of accuracy, an opening is afforded for dishonest assertions, which is certain to be availed of. In England, every lawyer too well knows the difference in the trustworthiness of an affidavit couched in guarded language, and conveying promiscuously, matters of observation, information, and belief, and that of a deposition made in open Court, and forced to

information, and was driven as a stranger to all sorts of expedients for the purpose of obtaining from the ryots his share of the payments due from them. Possibly, too, there was some special ground of doubt as to the defendant's liability; the land cultivated by him might lie near the boundary limits of the mouzah, or he might have been accustomed to pay solely to one sharholder, and not in quotas to the several sharholders. Thus circumstanced, the plaintiff came into Court on a case, which was generally true in all its principal features, and which was only untrue in one small critical point. Therefore, as trials are usually had and carried out, he had every chance of success, for on his side was the respectability of position, and the *a priori* probable justness of demand which Indian Courts are prompt to recognize; but if trials were commonly had and carried out as they ought to be, such a suit would never have been risked. It must be remembered that a judgment in his favour, by whatever means obtained, would have been *pro tanto* simply a reduction into possession of his purchased property.

be direct and relevant. Also the difference in the honesty of the evidence given in trials, such as those denominated running down cases, breach of warranty cases, and so on, where the facts in issue are of a character to render a conviction for perjury impossible, and that of the evidence in ordinary cases, where the facts admit of being tolerably well ascertained. It is, therefore, I think for all reasons a most serious consequence of the crude and imperfect way in which trials of first instance are effected in the Mofussil, that a witness however false can seldom, or never, be shown to be guilty of perjury on a material fact. The drift of a witness's testimony (nay the very fact that he stands forward to give evidence at all) may be falseness itself; and yet as evidence is taken, there may not be, and generally is not, in it a single statement of material definite fact which can by any possibility be demonstrated to be untrue to his knowledge. Of course, this circumstance of itself serves to show that the Court which took the evidence was incompetent to its first duty; but the result remains. However, the loose practice, which is universal in the reception of, and the dealing with, documents, is even more fruitful still in mischief. When a document may be used, and almost certainly will be, if used at all, without any one being called upon to authenticate it by testimony as to its origin and

history, an opening for dishonesty exists, which it is difficult to over-estimate. And one is literally lost in amazement at finding it to be the case that a practice of such sort obtains with tribunals which make it their habit to slight oral testimony and to depend almost solely on documents. The great evil growing out of the foregoing causes is apparent enough. It is variously attributed to the invincible untruthfulness of the native character, the rascality of the mookhtars, the technicalities of the English trial system, and so on. The Courts now and then attack it in a most frantic way by charging and convicting an unfortunate witness of perjury on a collateral point, as for instance that he swore he was no relation of the plaintiff, whereas he was his cousin-brother; or by prosecuting a mookhtar for filing a document knowing it to be a fabricated document, and with the intention of its being used as evidence. But I see no indication anywhere that the perception of the evil has taught the Courts the proper lesson.

Imperfect complaints which, whether of design or otherwise, do not disclose a complete cause of action, and issues raised on collateral matter, or vaguely or ambiguously framed, are fertile in grounds of appeal and of remand; and I need hardly say that these faults are entirely within the control of the Courts themselves.—*The Indian Economist*, 31st August, 1874, pages 11 to 14.

HIGH COURT, N. W. P.

The 10th July, 1874.

FULL BENCH.

Before Sir R. Stuart, C. J., and Pearson,
Turner, and Oldfield, *Judges.*SYUD MAHOMED, (Plaintiff) *versus*
MUSSAMAUT KANIZUK FATIMA (De-
fendant.)*Suit for a Declaratory Decree—*
Act VIII. of 1859, Sec. 15.

A suit in which the plaintiff prayed for a decree declaring that the defendant was not, as had been fraudulently recorded in the revenue registers, a perpetual lessee, but only tenant at will of certain villages, of which the plaintiff was proprietor, held to be maintainable.

Statement of the following facts seems necessary :—

One Mahomed Bakur had endowed an *imambarah* at Lucknow with a sum of Rs. 1,340 per annum, to be collected from the villages in dispute and transmitted to Lucknow for the support of the *imambarah*. His will contained the following para. :—“ I have made a charitable bequest of the three villages..... which are in my sole and exclusive proprietary possession, and at present yield a profit of Rs. 1,310 per annum, according to the lease of Mahomed Ali, and I have executed a deed of endowment of the said villages, appointing Syud Mahomed, my own son, the child of my loins, and Syud Tukee, to the office of *mutwali*, and have delivered it to the latter.....” Mahomed Bakur died in March, 1863, and Mahomed Ali in the following

December. Shortly after the death of Mahomed Ali the name of his daughter, Mussamaut Kanizuk Fatima, was substituted by the order of the Assistant Collector, dated the 16th March, 1864, for that of her father, as the perpetual lessee of the villages, at a rental of Rs. 1,341 per annum.

The plaint set forth that the defendant Mussamaut Kanizuk Fatima was not the perpetual lessee of the villages in dispute, nor was she entitled to hold them from generation to generation on payment of Rs. 1,341 annually. Through the fraud of Kalka Persaud, an attorney of the plaintiff's guardian, and his collusion with the defendant, her name was entered in the revenue registers, on the 16th March, 1864, as a perpetual lessee, from generation to generation. The plaintiff was directed to seek remedy in the Civil Court, as the Revenue Court could not take the alleged fraud and collusion into consideration because it involved a question of title. The other facts connected with the case will appear in the following judgment.

STUART, C. J., and SPANKIE, J., before whom the appeal originally came on for hearing differed in opinion. Their opinions were as follow :—

SPANKIE, J.—This was a suit to obtain a declaration that the defendant was not the lease-holder in perpetuity in the Cawnpore district on payment of a yearly rent of

Rs. 1,341, and also to recover Rs. 4,400, which the defendant had appropriated from the profits of the estate during the minority of the plaintiff, in collusion with the attorney of the guardian of the said plaintiff, who, on the 16th March, 1864, allowed the defendant to record herself in the revenue register as perpetual lease-holder. When the fact came to the knowledge of the plaintiff's guardian, he at once petitioned the Collector for the removal of the defendant's name as perpetual lease-holder, but was referred to the Civil Court. The plaintiff became of age on the 17th May, 1872, and now brings this suit, valuing his claim to the declaration prayed for at Rs. 130, and the whole suit, including profits, at Rs. 4,530. The claim to Rs. 4,400 has been withdrawn in appeal.

It was contended by defendant that a claim for declaratory right without consequential relief, or asking for possession, could not be entertained, and that a ten rupee stamp was not sufficient to meet the requirements of the Stamp Act. It was urged that, according to the ruling of this Court in the case noted in the margin, no person could be permitted to sue for mere declaratory title, without disclosing any cause of action.

The Subordinate Judge held this case to be entirely applicable to the

claim before him, and dismissed the suit. He also appears to have held that the villages had been declared "wuf" and the income of Rs. 1,341, derived from the lease, was payable to the plaintiff in his capacity as "mutwali," or superintendent of the *imambarah* at Lucknow, to support which the income had been devoted by the lessor, and not as one of the heirs of the lessor, and that as the plaintiff would not abandon the double right, or the claim to mesne profits, his suit could not be entertained in its present form.

As already observed, the claim to profits has been withdrawn, and the present appeal is to support the plaintiff's right to a declaration that the lease is not one in perpetuity. It has been objected that the suit, even for the declaration, is insufficiently valued, as the right, if there be one at all, is worth more than Rs. 130, and reference was made to a decision of this Court in this very case on a question of jurisdiction, whether the appeal from the decree of the Subordinate Judge lay to the Judge of the district or to this Court, and it was held that the value of the lease, if established, would be more than Rs. 600, whilst there was still the claim for mesne profits, amounting to Rs. 4,400, in addition to the stipulated rent of Rs. 1,341. In that appeal, however, the defendant raised the question of the value of the property, in order to determine the jurisdiction

Synd Khadim Ali, v. Musamaut Nazeer Begum, High Court Reports, N. W. Provinces, 1871, p. 262.

of the Court, and it was not the value of the stamp, on which the suit was brought, that was in issue. No objection was made below to the shape in which defendant now desires to raise it, and the claim for mesne profits has been withdrawn. For the purpose of this suit it may be said that the stamp is sufficient. The real primary question at issue is, whether or not the suit can be entertained at all. Appellant's pleader in the second ground of appeal contends that there is nothing in Section 15 of Act VIII. of 1859 that precludes a suit for a mere declaration of title without consequential relief. This, doubtless, is so, but the latter portion of the section leaves it discretionary with the Court to make binding declarations of right without granting consequential relief, and it is in the exercise of this discretion that the Court below, following the usual practice, and on the authority of the precedent cited, dismissed the suit. But the principle on which that ruling proceeds depends on the necessity imposed on the plaintiff of showing on the face of his plaint, not merely that he has a title, but that circumstances exist which compel him to come into Court for the purpose of clearing it. He must, in fact, have some cause of action: there must be something on the defendant's part hostile to the plaintiff's right, and for which the Court could, if asked to do so, grant relief.

It was at first disposed to think that as the defendant had been recorded in the Collector's register as an *istimrari* or perpetual leaseholder, in lieu of her father, and in spite of the plaintiff's guardian's objections, who was referred to the Civil Court, there was a cause of action, and that he was at liberty to bring a suit under Section 15, Act VIII. of 1859. But on looking more closely into the plaint it did not appear that the plaintiff averred that the defendant had in any way attempted to assert a higher title than her father, or that the Collector had interfered with the previous record of names or with possession, except to order the substitution of the daughter's name in lieu of that of the father, deceased. If, therefore, the plaintiff felt aggrieved by the mutation of names and the Collector's decision that defendant had succeeded her father as lessee of the three villages, under a perpetual lease, whereas they were both but tenants-at-will, he should have sued to recover possession of the three villages, which, if his cause of action had been good, the Court could have decreed him, instead of suing for a mere declaration that the lease was not perpetual, and not asking for possession, the consequence of which omission might be that he would be debarred from bringing a future suit for ejection on the same cause of action. If, then, the plaintiff really brought this suit to obtain a

decree may be made without granting any consequential relief or in which the party does not actually seek for consequential relief in the particular suit; otherwise the 15th section of the Code would have no operation at all. What their Lordships understand to have been decided in India on this article of the Code, and in the Court of Chancery upon the analogous provision of the English statute, is that the Court must see that the declaration of right may be the foundation of relief to be got somewhere." If this particular suit had been one brought to clear the plaintiff's title as superior landlord, and to open a way for his contesting the duration of the lease in the Revenue Court, I should not have hesitated to admit his right of suit. But his superior title as that of the lessor is not in issue, and it is now doubtful whether he will be hereafter in a position to sue elsewhere to eject the lessee.

This being the view entertained by me, I should feel no hesitation in dismissing the appeal and in affirming the judgment of the lower Court with costs. Having come to this conclusion, it is unnecessary to notice the objections put in by the other side under section 348 of Act VIII. of 1859, of which it may be said that it is doubtful whether they ought to have been admitted. Since the preparation of this proposed judgment I have learnt that the Ho-

nourable the Chief Justice wishes to refer the case to a Full Bench. This is a course to which I can have no possible objection. Indeed, I should be glad to have the judgment of my honourable colleagues on a section of the Code about which there are so many opinions.

STUART, C. J.—This is a suit to have it declared that the defendant is not an "*istimrári*" or perpetual lessee of certain villages in the district of Cawnpore; also to recover Rs. 4,400, which the defendant had appropriated from the profits of the state, during the plaintiff's minority. This latter claim, however, has been abandoned, and the only question which remains is, whether, seeing that the plaintiff does not ask for possession or any other consequential relief, this suit for a declaration against the defendant's claim as an "*istimrári*" lessee can be maintained. Mr. Justice Spankie has gone fully into the particulars of the case, and has examined the authorities referred to at the hearing, *viz.*, a ruling of this Court decided 19th August, 1871, and two decisions by the Privy Council, and he is of opinion that the judgment of the lower Court ought to be affirmed and the appeal dismissed,—in other words, that the suit be dismissed.

There can, I apprehend, be no doubt, that a suit for a negative declaration can be entertained, provided it is based on adequate and relevant facts, and in the present

case the whole question depends upon what is the true legal character, the extent and limits of the declaratory suit, positive or negative, and I hesitate to say that such a declaration as is here sought can not be supported. In the ruling of this Court referred to, it is laid down, that along with the declaration sought, the plaint should show "a cause of action." The soundness of that ruling I venture to doubt,—that is, if by cause of action is meant a cause of action which could be entertained irrespective of the declaration sought, and on which issue could be taken separately and independently. But instead of expressing my own opinion in the face of it I should like it to be re-considered; and as to the judgments of the Privy Council, they are not, as I read them, opposed to such a declaration as is asked for in the present case. In support of the plaint claiming such a declaration, I do not think it necessary that it should show on the face of it a cause of action, *i. e.*, a separate and independent cause of action, on which issue could be taken, irrespective of any declaration of right or title. All that is wanted as the basis for such a declaration is, I think, simply a state of things arising from disputed facts respecting some material question of right, shewing the necessity of a declaratory decree. In the plaint in the present case it is alleged that the defendant's

name was entered in the revenue papers as *istimrári* lessee, and during the plaintiff's minority, for the expungement of which entry the plaintiff's guardian petitioned the revenue authorities, alleging fraud and collusion, but which allegations the Revenue Court could not enquire into, because there was a question of right involved, and they directed the petitioner to seek his remedy in the Civil Court. This is certainly a meagre statement on which to base a declaratory suit, but having regard to the nature and purpose of that form of suit, I am doubtful as to whether it is not sufficient.

Nor do I think there is, under section 15 of the Code, such a *discretion* in granting or withholding a declaratory decree as appears to have been laid down. The discretion, if any, is not an arbitrary one, but one to be exercised in the sense of a duty, should the necessities of a suit so require.

Instead of, however, writing a separate judgment myself, I propose that the case should be argued before a Full Bench, and which would have the opportunity of re-considering all the authorities and rulings that can be brought to bear on a very important and valuable form of procedure.

Mr. Justice Spankie concurs in the reference to a Full Bench, and his opinion is also herewith submitted.

The question we refer to a Full Bench is whether, having regard

to the facts and proceedings set out in the plaint, and the nature of the relief sought, such a declaratory suit as this can be maintained.

The Full Bench (STUART, C. J., and PEARSON, TURNER, and OLDFIELD, J.J.) delivered the following opinions :—

PEARSON, J.—For the claim, set forth in the first part of the plaint, to a declaration that the defendant is not a permanent lessee of the estate in suit, the plaintiff appears to have a sufficient cause of action, inasmuch as she has alleged herself to be the permanent lessee of the estate. He does not wish to eject her from the property; but he is surely entitled to have his real rights and her actual position in regard to the estate ascertained and declared. The latter portion of the claim, *viz.*, that for mesne profits, appears to be founded on a misconception and to be untenable; but it does not in my opinion preclude the plaintiff from obtaining the declaration which he seeks in the first part of the plaint, if he be found entitled thereto.

TURNER, J.—I also am of opinion that if the plaintiff establishes the allegation made by him in this suit, he is entitled to a decree for a declaration of title. He will have proved his interest, and he will have proved that his position as proprietor, whether in his own right or as *mutawali* has been invaded by the defendant, who, being a tenant from year to year, as-

serts that she holds under a perpetual lease, and has succeeded in obtaining the title asserted by her recorded in the revenue register. The plaintiff has alleged a sufficient cause of action to entitle him to the relief he seeks. This cause of action was sufficiently set out in his plaint; and a decree, declaring that the interest of the lessee is not permanent, but that of a tenant from year to year, is not in any way opposed to the ruling of this Court, to which advertence has been made in the referring order and of which the principles appear to me to be fully sanctioned by the judgments of the Privy Council in *Sreenarain Mitter versus Sreemutty Kishen Soondery Dassee and Sadut Ali Khan versus Khajeh Abdool Gunney*.

OLDFIELD, J.—In this case plaintiff sues to obtain a declaration that defendants are not lease-holders in perpetuity of certain estates, and from his plaint and deposition his case is that the lease was terminable at will and he has considered the defendants as trespassers since 1864, and he joined with his claim one for mesne profits since 1864; this last part of the claim was withdrawn.

The question is whether this suit for a declaration of title can be maintained.

The broad principle is that a declaratory decree may be given when it may be the foundation of relief to be got somewhere, and

I see no sufficient grounds for assuming in this instance that such may not be the case here, and there has been a sufficient cause of action in the present case, and I would hold that the suit is maintainable.

STUART, C. J.—I am glad that the Full Bench are substantially agreed, and that they approve the opinion I expressed in my first judgment in favour of a declaratory suit lying under the circumstances explained in the order of reference. I myself remain of the same opinion, but I reserve the delivery of my judgment, after the procedure that has taken place, until the case comes back to me in the Court of the referring Bench, which I hereby direct to be done.

The case having been returned to the referring Bench judgment was delivered as follows:—

STUART, C. J.—As the referring Bench, this case, after having been considered by the full Court, has come back to us. I entirely concur in all the opinions expressed by my colleagues, and as to the allusion in the opinion of Mr. Justice Turner to the meaning of “a cause of action” in relation to such a suit, I need only say that I entirely agree with him that there is a sufficient cause of action in the present case, and I indicated my opinion to that effect in my referring order. I desire at

the same time to express it as my own opinion that a declaratory suit does not require for its basis such a clear traverse of fact, in a controverted claim, as in other forms of suit in which the question is, not so much for the vindication of a right and title, as for substantial recovery; and on this subject I need only repeat what I said in my referring order, *viz.*, that “all that is wanted as the basis for such a declaration is, I think, simply a state of things arising from disputed facts respecting some material question of right, shewing the necessity of a declaratory decree.” And in the present case the allegation in the plaint of fraud and collusion in the entry of the defendant’s name in the revenue papers, and the refusal of relief by the revenue authorities, was such a cause of action.

In further disposing of the case at present we need only say that we allow the second reason of appeal, and that, reversing the decision of the Subordinate Judge, we remand the case under section 351 for trial on the merits, and for a decree thereon. The costs of this appeal, including those of the hearing before the full Court, to be costs in the cause.

BRODHURST, J.—I concur with the learned Chief Justice in remanding this case to the lower Court to be tried on the merits.

HIGH COURT, N. W. P.

The 10th July, 1874.

FULL BENCH.

Before Sir Stuart, C. J., and Pearson, Turner,
Oldfield and Brodhurst, Judges.

LALL SINGH (Plaintiff),

versus

ZAHURIA and others (Defendants.)

*Order refusing re-admission of
Appeal dismissed for default of
Prosecution—Special Appeal—Act
VIII. of 1859, Secs. 346, 347 and
372.**(Held by the Full Bench.)*—A Special Appeal lies from an order rejecting an application, under Sec. 347 of Act VIII. of 1859, for the readmission of an appeal dismissed for default of prosecution, if it appears that the Court below has not exercised the discretion which it possessed under the section.*(By Division Bench.)*—The lower Appellate Court, without enquiry, and without recording any reasons, summarily refused an application under Sec. 347. The order of refusal was set aside in special appeal, and the application remanded for proper consideration and disposal.

An appeal having been dismissed under Sec. 346 of Act VIII. of 1859, an application was made under Sec. 347 for the re-admission of the appeal on the ground that the appellant's pleader did not delay more than five minutes after he was informed by a peon that the appeal was coming on for hearing, and that the appellant himself was present at the door of the court-house and would have proceeded with the appeal had he been called upon to do so. The Judge passed the following order on the petition:—"After perusing the peti-

tion, it is ordered that the petition be rejected."

In special appeal the question arose whether a special appeal would lie from the order of the Judge and it was referred to the Full Bench.

The opinion of the Full Bench was as follows:—

Looking to the effect of the order, that it in fact determines the appeal, we apprehend that, construing the term decision in its largest sense, it will embrace such an order. In this view, which we adopt, a special appeal is admissible, if it raises pleas which justify the Court in interfering with a discretionary order. When the appeal comes on for hearing, it will be for the Court to consider whether it is at liberty to interfere with the order passed by the Court below, if it appears that the discretion which that Court possesses, has been reasonably exercised.

The appeal having been admitted, the judgment of the Court (Pearson and Oldfield, J.J.) was as follows:—

The Full Bench having ruled that the Judge's order of the 9th of February, 1874, may be made the subject of a special appeal, upon proper grounds, this appeal has been admitted, and we proceed to dispose of it.

Section 347 of Act VIII. of 1859, provides that, if an appeal be dismissed for default of prosecution, the appellant may, within thirty

days from the date of the dismissal, apply to the Appellate Court for the re-admission of the appeal ; and if it shall be proved to the satisfaction of the Court that the appellant was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the Court may re-admit the appeal. The case in which an appeal is dismissed, notwithstanding the presence of the appellant in Court is still stronger than that of an appellant prevented from appearing. In the present instance the appellant applied for the re-admission of his appeal to the lower Appellate Court on the grounds (1) that he had been present there at the time of the call, but had not heard the call ; and (2) that his pleader had been engaged in another case in another Court at the time of the call, but had put in an appearance within five minutes or as soon as possible. The grounds on which the application was made certainly deserved to be enquired into and considered by the lower Appellate Court, which, without making any enquiry or recording any reasons, summarily refused it. We set aside the lower Appellate Court's order of the 9th of February last, and remand the application to it for proper enquiry and consideration and disposal, in accordance with the spirit of section 17 of the Civil Procedure Code. The costs of this appeal will follow the result.

BOMBAY HIGH COURT.

The 24th March, 1874.

(Before Lloyd and Kemball, J.J.)

DAMODAR GORDHAN (Appellant)

versus

GANESH DEVRAM ET AL (Respondents.)

Act I. of 1872, Sec. 113—Cession of Territory—Power of Indian Governments.

The power to cede territory was not one of the powers to which the Secretary of State for India in Council succeeded under Act 21 & 22 Vic, c 106, when the Government of India was, by that statute, transferred to Her Majesty, inasmuch as such a power was not possessed by the East India Company.

The Indian Legislature cannot make, and the Crown cannot sanction, a law having for its object the dismemberment of the State in times of peace, as such a law must of necessity affect the authority of Parliament, and those unwritten laws and constitutions of the United Kingdom of Great Britain and Ireland, whereon depends the allegiance of persons to the Crown of the United Kingdom.

Section 113 of the Evidence Act (I of 1872) therefore, though not disallowed, is not protected by Sec. 24 of Stat 24 & 25 Vic, c. 67, and the direction therein contained, that a notification in the *Gazette of India*, that any portion of British territory has been ceded to any Native State, Prince, or Ruler, shall be conclusive proof that a valid cession of territory took place on the date mentioned in such notification, cannot be followed.

KEMBALL, J.—Before proceeding to discuss the important points raised, it will be well to sketch briefly the history of this case.

The action (Original Suit No. 380 of 1864) was brought in the Court of the Munsif of Gogo to redeem a field (situated in the village of Ghangli) which had been mortgaged in A. D. 1812 to one Gordhan. The defendant denied

the mortgage and set up a sale ; but the Court decreed for the plaintiff. In appeal, however, the Assistant Judge of Ahmedabad reversed that decree, when a special appeal was preferred to the High Court, which remanded the case for retrial, because that the lower Court had improperly excluded from its consideration an important document.

The regular appeal was then reheard by the District Judge himself who found the mortgage proved, and affirmed the Munsif's decree.

A second special appeal was thereupon preferred to the High Court, mainly on the ground that "the Judge had no jurisdiction to try the appeal, as the village in which the land is situated was removed from the jurisdiction of the Civil Courts long before the appeal was decided." This objection was based on a notification, dated the 29th January 1866, published in the *Bombay Government Gazette*, p. 197, and signed by the Chief Secretary to the Bombay Government, which signified that in accordance with a convention made between His Excellency the Governor of Bombay and His Highness the Thakore of Bhownugger, certain villages (including Ghangli) "are removed from the jurisdiction of the Revenue, Civil, and Criminal Courts of the Bombay Presidency from and after the 1st of February 1866." No further information was offered, though

time was given for the purpose ; and the Division Bench, which heard the appeal,* rejected it on the ground that there was nothing to show that the jurisdiction of the High Court and of Courts subordinate to it, which once existed, had legally ceased to exist.

Subsequently, the appellant made a petition of review, and on its being shown that the transfer of the village of Ghangli from British to foreign territory was made by the order of the Government of India with the sanction of the Secretary of State, this Court considered that a good ground had been made out for the re-hearing of the special appeal, and accordingly granted the review.

The question of jurisdiction has now been formally argued before us.

The appellant's arguments, put shortly, amount to this, that the right to cede territory was vested in the Court of Directors in concert with the Board of Control, who had power to acquire territory and to make treaties with foreign princes, to which right the Secretary of State for India succeeded under the provisions of Sec. III., Chap. 106 of 21 & 22 Victoria ; that this Court, under Sec. 57 of the Indian Evidence Act, was bound to accept the territorial alterations notified in the proclamation in the *Bombay Government Gazette* ; and, further, that this

* See the judgment printed in a note at the end of the case.

Court, being bound by the law, cannot but hold the cession to be valid under Sec. 113 of the same Evidence Act coupled with a notification in the *Gazette of India*, 4th January 1873, as follows :—"The Governor General of India in Council hereby notifies the fact that the villages mentioned in the Schedule here below appended were, on the 1st February 1866, ceded to the State of Bhownugger" (the village of Ghangli being included in the same Schedule).

Whereas, on behalf of the respondents, it was urged, with much force and ability, that the power to cede territory, and therewith to transfer the allegiance of subjects, was never possessed by the Court of Directors, and, therefore, could not be transferred to the Secretary of State, such power residing in the Imperial Legislature alone, that, therefore, the cession was invalid, and the recent notification in the *Gazette of India*, made for the purposes of Sec. 113 of the Evidence Act, was worthless, it being *ultra vires* of the Legislative Council, as in various ways in defiance of Acts of Parliament; that the Legislature had no power to make retrospective laws; and, lastly, that even though the question of jurisdiction be decided against the respondents, the appellant having already attained to the jurisdiction, cannot now be heard to object.

With regard to attorning to the jurisdiction, the respondents' argu-

ment appears altogether untenable; it is advisable, therefore, at the outset to dispose of that question. Certain English cases have been quoted to us in support of the contention that a suit can be carried on within British jurisdiction as regards land in foreign territory; but none of those cases go to the length of showing that parties out of the jurisdiction can litigate in a British Court to recover land situated out of British territory, and they clearly have no application to the present case. It is manifest that the acts and conduct of parties cannot of themselves give any Court a jurisdiction, not before possessed, over the subject matter in dispute; and it is also manifest that if the legal effect of the cession of territory notified was to remove the village of Ghangli out of the jurisdiction of the District Court of Ahmedabad, Secs. 3 and 37 of Act XXIII. of 1861 provided an absolute bar to the Judge's hearing this appeal.

Two main questions arise in this case, one as to the effect of the declaration in the *Gazette of India*, in January last, that territory has been ceded, and the other as to the validity and legality of the cession itself.

The power of the Indian Legislature to create such a statutory presumption having been challenged, on the ground that it affects the authority of Parliament, we find that the first of these questions

involves an inquiry into the very serious one of the Crown's prerogative to cede territory.

We prefer, then, first to consider, with regard to the second question, what rights for cession of territory were vested in the East India Company, for it is clear that only those powers, which the Company possessed "either alone, or by the direction and with the sanction of the Commissioners of the affairs of India," devolved upon Her Majesty's Secretary of State.

We know that from the time of their first Charter, granted by Queen Elizabeth in 1600 down to 1767, the Company were merely recognized as traders, but as their struggles with the French Company left them, at the peace of 1763, masters of a large portion of territory, their position attracted the attention of Parliament, and the House of Commons appointed a Committee to inquire into the nature of the Company's Charters, the inquiry resulting in their being continued, by 7 Geo. III. Ch. 57, Sec. 2, in possession of their territorial acquisitions and revenues, as well as their exclusive trade, until the 1st of February 1769, on condition of the payment of a certain annual sum. From this date, the Company's exclusive trade and government were renewed from time to time, until, by 3 & 4 Wm. IV., Ch. 85, their trade was suspended, except in so far as it might be carried on for purposes of

government, their term of government being continued until the 30th of April 1854, and, finally, this term was renewed "until Parliament should otherwise provide," until, in fact, the passing of 21 & 22 Vict., Ch. 106, which transferred the Government of India to Her Majesty.

We see, then, that from the year 1767, when the East India Company's territorial acquisitions were first recognized as British territory, they were, from time to time, continued in possession of them, subject to the authority of Parliament.

It is alleged that the Company, in concert with the Board of Control, had power to acquire territory, and to make treaties with foreign princes, and it is argued that they must have had power to cede territory also for the purposes of such treaties; but we see clearly that whatever powers the Company and Board possessed were derived from Parliament. All the Charters from 1767 expressly entrust the Company with possession and government of the British territories and appropriation of the revenues (as a necessary means of governing) for the Crown; and the Board of Commissioners was created with "full power and authority to superintend, direct, and control all acts, operations, and concerns which anywise relate to, or concern, the Civil and Military Government and revenues of the said territories and acquisitions in the East Indies."

And, though it may be inferred that the Company and Board had power to levy war or make peace and to make treaties with native princes and states in India for guaranteeing their possessions, nowhere are we able to find any indication of an authority to dismember already existing British territories. On the contrary, it is a significant circumstance that Parliament expressly provided the Court of Directors with power, under the direction and control of the Board of Commissioners, to "declare and appoint what part or parts of any of the territories under the government of the Company should, from time to time, be subject to the government of each of the several presidencies then subsisting or to be established, and to alter, from time to time, the limits of the Presidencies and Lieutenant Governorships." If, therefore, special enactments were necessary to enable the Government of the country to make internal arrangements and distributions of British territories, *a fortiori* would it appear that, without such special enactment, they were incompetent to cede any portion of them.

Mr. Forsyth, in his *Cases and Opinions on Constitutional Law*, page 185, gives two instances of cession (not under treaty of peace) by the East India Company to a foreign state previous to 1858 :—

"1. In 1817 a cession by treaty 'in full sovereignty' to the Sik-

humputtee Rajah of a part of territory formerly possessed by the Rajah of Nepaul, but ceded to the East India Company by a treaty of peace."

"2. In 1833 a cession by treaty to Rajah Voorunder Singh of a portion of Assam lying on the south of the Burrampooter river, by which the Rajah bound himself, in the administration of justice in the country now made over to him, to abstain from the practices of former Rajahs of Assam, as to cutting off ears and noses, extracting eyes, or otherwise mutilating and torturing." Alluding to the latter case, Mr. Forsyth adds: "This is not a very satisfactory precedent, and it shows the kind of risks to which British subjects might be liable on being transferred to a semi-barbarous power."

And certainly these two isolated cases furnish no sufficient presumption of the existence of a prerogative of which we cannot find any trace in any of the various Acts defining the Company's *status* and powers.

Holding, then, that the power to cede territory was not one of the powers to which the Secretary of State succeeded under the Act transferring the Government of India to Her Majesty, we turn to consider the effect of the *Gazette of India's* notification.

Sec. 113 of the Evidence Act, which received the assent of the Governor General on the 15th

March 1872, runs thus:—"A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince, or Ruler, shall be conclusive proof that a valid cession of territory took place on the date mentioned in such notification." This section was first introduced in the amended Bill presented on the 30th of January 1872 to the Legislative Council of the Governor General with these remarks by the Select Committee: "A conclusive presumption is a direction by the law that the existence of one fact shall in all cases be inferred from proof of another. This we have provided in Secs. 112 and 113"; and "we have provided in the Chapter on the Burden of Proof that a notification in the *Gazette* that a territory has been ceded to a native prince shall be conclusive proof of a valid cession at the date mentioned in the notification. The object of this section is to set at rest questions which, as we are informed, have arisen on this subject."

Our judgment in this case was passed on the 2nd December 1870 when there existed only the notification of the *Bombay Gazette* dated 29th January 1866; and we granted the review on the 16th December 1872, in order that it might be argued whether the sanction of the Secretary of State did not operate to create a valid cession. But on the 4th of January

1873 appeared in the *Gazette of India* the notification that the village of Ghangli, with several others, had been ceded seven years before; and we are now told that, even though the approval by the Secretary of State of the cession be not all sufficient, we cannot consider that question. No doubt, this would be the effect of Sec. 113, provided that it lay within the power of the Legislative Council to make such a law.

What then are the powers of the Council of the Governor General? By Sec. 43, 3 & 4 Wm. IV., Ch. 85, the Governor General in Council was empowered to legislate for India, except that he "shall not have the power of making any Laws or Regulations which shall, in any way, affect any prerogative of the Crown or the authority of Parliament * * * or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend, in any degree, the allegiance of any person to the Crown of the United Kingdom, or the sovereignty and dominion of the said Crown over any part of the said territories."

This section was repealed by Sec. 2, Act 24 & 25 Vict., Ch. 67, "The Indian Councils' Act"; but by Sec. 22 of this Act, it was again provided that "the Governor General in Council shall not have the power of making any Laws or Regulations * * * which may affect the authority of Parliament * * *

or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend, in any degree, the allegiance of any person to the Crown or the sovereignty and dominion of the said Crown over any part of the said territories." Further on, in Sec. 24 of the same Act, we find "that no Law or Regulation made by the Governor General in Council (subject to the power of disallowance by the Crown, as hereinbefore provided,) shall be deemed invalid by reason only that it affects the prerogative of the Crown."

It is a notable circumstance that the wording of the repealed Section of 3 & 4 Wm. IV., Ch. 85, and of Sec. 22 of the Councils' Act, substituted for it, differs only in one particular, *i. e.*, that in the latter the words "prerogative of the Crown" are omitted, nor is it easy to understand the reason for this omission. Prior to this Act, no general power was given to the Crown to disallow laws made by the Legislative Council.

Sec. 26 of 16 & 17 Vict., Ch. 95, declared "that no law or regulation was to be invalid by reason only of its affecting any prerogative of the Crown, provided it had received the previous sanction of the Crown signified in a prescribed form;" and the Councils' Act, which repealed this, made express provision for the transmission to the Secretary of State for India of

copies of all laws and regulations assented to by the Governor General and for their disallowance by Her Majesty.

In neither case was any law affecting the prerogative of the Crown to be deemed invalid, provided that before the passing of the Council's Act, the Crown had previously sanctioned it, or that after that period it had not been disallowed.

But the law expressly prohibiting the Legislative Council of India from making any law affecting the authority of Parliament is, in no way, varied or altered by the Indian Councils' Act.

The value, therefore, of Sec. 113 of the Evidence Act depends on the constitutional question of prerogative. If the Crown alone has power to cede territory, then this provision of the law is valid and binding so long as it is not disallowed; but if, on the other hand, that power can only be exercised with the authority of Parliament, it follows, as a matter of course, that the Legislative Council exceeded its power and that Sec. 113 was, and must continue to be, bad law.

On this point, we have been referred to the opinions of Grotius, Vattel, Puffendorf, Chalmers, Wheaton, Phillimore, and Twiss, who all appear to support the proposition that no power resides in the Crown to cede territory, save under circumstances of necessity. Most of these writers are referred

to by Mr. Forsyth in the work to which we have alluded above, and the conclusion at which he appears to arrive is that while the Crown can, by virtue of its prerogative, without any doubt, make cessions by treaty of peace at the close of a war, its power to cede territory in any other way is extremely questionable. Vattel, Puffendorf, and Grotius may or may not be accepted as authorities, but Mr. Forsyth strengthens his opinion by a consideration of known precedents. He quotes various instances of cessions made in adjustments of quarrels between nations, but can only find two in support of the Crown's unconditional prerogative—the case of the Orange River Territory and the sale of Dunkirk by Charles II. ; and the latter of these two he regards, with much reason, as hardly a constitutional precedent. With reference to the Orange River Territory, we have been unable to consult the correspondence to which reference is advised ; but as it is questionable whether the British nation ever acquired a right of property in the territory, it may be more easily allowed that it was in the power of the Crown to rescind that which it had ordained, by its letters patent, without reference to Parliament. The cases, moreover, are not analogous, for the British territories in India have been the subject of Parliamentary Legislation from the time of their acquisition, and have become there-

by a material part of the property, and, therefore, of the body of the State.

It appears to be considered by some, *vide* Lord Palmerston's speech in the debate on the relinquishment by the British Crown of the Protectorate of the Ionian Islands, that a distinction exists between cessions of British freehold and of territory acquired by conquest during war and not by treaty or ceded by treaty and held as possession of the British Crown ; but the cases he quoted were all, observes Mr. Forsyth, cessions at the close of a war. On what principle can such a distinction rest ?

All subjects of the Crown possess the same rights and incur the same obligations. Allegiance, by the English law, is correlative with protection, and is to be looked upon as a relation, not only between a sovereign and subjects, but as between a corporation and its members.

That Her Majesty's subjects in India have the same rights with all her other subjects is clear from the Queen's proclamation of 1858 ; and the same fundamental rule, restricting the prerogative of the Crown from interference with the allegiance of subjects and their right to protection, must apply equally to all and every part of Her Majesty's dominions.

Vattel's arguments, on the principles involved, commend themselves to our reason. In his Book

i, Ch. 21, Sec. 263, he says: "A nation ought to preserve itself; it ought to preserve all its members; it cannot abandon them, and it is under an engagement to support them in their ranks as members of the nation. It has not then a right to traffic with their rank and liberty on account of any advantage it may expect to derive from such a negotiation. They have joined the society for the purpose of being members of it. They submit to the authority of the State for the purpose of promoting in concert their common welfare and safety, and not of being at its disposal like a farm or a herd of cattle. But the nation may lawfully abandon them in a case of extreme necessity, and she has a right to cut them off from the body, if the public safety requires." In considering, further, whether the Prince has power to dismember the State, he says that "this depends on whether he has received full and absolute authority from the nation;" and proceeds: "The nation ought never to abandon its members but in a case of necessity or with a view to the public safety, and to preserve itself from total ruin; and the Prince ought not to give them up for the same reasons. But since he has received an absolute authority, it belongs to him to judge of the necessity of the case, and of what the safety of the State requires."

We have no knowledge of the

reasons which induced the transfer of Ghangli and other villages to the State of Bhowanagar, but it is certain that there existed no such necessity as is recognized by the publicists.

If, then, it be a fundamental law that the sovereign cannot of himself dismember territories, and that he can only do so with the sanction of the people in cases of real necessity, it follows that the Indian Legislature cannot make, and the Crown cannot sanction, a law having for its object the dismemberment of the State in times of peace.

Further, if the sanction of Parliament be necessary for a cession in times of peace, and if allegiance be indefeasible, it follows that such a direction of the law as the one we are contemplating, must of necessity affect the authority of Parliament, and those unwritten laws and constitution of the United Kingdom of Great Britain and Ireland, whereon depends the allegiance of persons to the Crown of the United Kingdom.

This being so, Sec. 113 of the Indian Evidence Act, though not disallowed, is not protected by Sec. 24, 24 & 25 Vict., Ch. 67, and we cannot, therefore, follow its directions.

For these reasons, we decline to alter our decision, which will, therefore, stand. Costs on appellant.

Note.—The judgment in the original special appeal in the above case was delivered on the 2nd December 1870, as follows :—

No attempt has been made to support the second objection raised in this special appeal, and the only point which we have to determine is whether, as has been urged, “ the Judge had no jurisdiction to try the appeal, because the village in which the land is situated was removed from the jurisdiction of the Civil Courts long before the appeal was decided.”

The circumstances are these. The suit was instituted in the year 1864 in the Court of the Munsif of Gogo, who awarded the plaintiff possession of the land sued for on payment of the amount of the mortgage, viz., Rs. 60. On the 18th January 1866, this decree was reversed by the Assistant Judge of Ahmedabad; but the case coming before the High Court on special appeal, it was remanded for fresh decision under date 21st December 1866, and, in accordance with this order, was disposed of by the Acting Judge of Ahmedabad on the 11th August 1869.

The disputed land is situated in the village of Ghangli, within the Pargana of Gogo (*vide* Act VI. 1859), and that Pargana forms part of the Zillah of Ahmedabad, as established by the second clause of Section 16, Regulation II. of 1827.

But it is argued that the village of Ghangli had been removed from the jurisdiction of the Civil Courts of the Bombay Presidency previous to the disposal of the case by the District Judge of Ahmedabad; and that, consequently, his decree is illegal.

This argument is founded on a notification dated 29th January 1866 and published at page 197 of the *Bombay Government Gazette* for that year. It runs as follows :—

“ Revenue Department.

“ It is hereby notified that, in accordance with a convention made between His Excellency the Governor of Bombay and His Highness the Thakore of Bhownugger, the under-mentioned villages belonging to the Thakore of Bhownugger, and situated in the Parganas of Dhundooka, Rampoor, and Gogo, Zillah Ahmedabad, are, from and after the 1st of February 1866, Sunvut 1922 Maha Vud 2nd, removed from the jurisdiction of the Revenue, Civil and Criminal Courts of the Bombay Presidency, and transferred to the supervision of the Political Agency in Kattiawar, on the same conditions as to Jurisdiction as the villages of the Talooka of the Thakore of Bhownugger heretofore in that province.

Schore Talooka.

Ghangli.

By order,

(Signed) F. S. CHAPMAN,

Chief Secretary to Government.

Bombay Gazette 29th January 1866.”

This notification, it may be observed, though signed by the Chief Secretary to Government, does not state by what authority it was issued; merely “ by order.” Appearing however, as it does, in the *Government Gazette*, and under the signature of the highest Ministerial Officer under Government, it may be assumed that it was issued by order of His Excellency the Governor in Council. But the notification is defective in a far

more material point, for it omits to recite the law which was supposed to confer on the Governor in Council the power to limit the jurisdiction of the Civil and Criminal Courts of this Presidency.

It has not been shown to us that any such law exists; and, on the contrary, we find that at the time this notification was issued, Section 6 of Regulation I. of 1827, which provides that "Regulations are to be in force at such places and from such periods as may be declared in a Regulation actually in force," was unrepealed, and as the Regulation establishing the Ahmedabad Zillah, of which the village of Ghangli forms a part, was also unrepealed, it follows that a legal enactment was necessary to effect the object which Government had in view when issuing the notification referred to. It was suggested in the course of the argument that the notification might have been issued under clause 2, Section XVI., Regulation II. of 1827; but even admitting that this law gives the Governor in Council power to cede territory, no authority could be assumed to exist in that body summarily to abrogate any law in force in such territory in the face of Section VI., Regulation I. of 1827.

That this notification is inefficacious is still more apparent when we come to look at the full force it was intended to have, for it purports to affect, not only the Local Courts, but also the High Court, which under Section I., Regulation II. of 1827 and Stat. 24 & 25 Victoria, Cap. 104, H. C. 9, has jurisdiction over all the territories subordinate to the Presidency of Bombay in which the Code

of Regulations has operation by enactment. It seems to us, therefore, that the notification referred to is, as far as the argument in this case is concerned, of no effect whatever, and that the village of Ghangli not having been legally removed from the jurisdiction of the District Court of Ahmedabad, the decree of the Judge must be upheld.

CALCUTTA HIGH COURT.

The 7th May, 1874.

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

DENONATH GANGOOLY, (Plaintiff)
Appellant,
versus

NURSINGH PERSAUD DOSS, (Defendant) *Respondent.*

Foreclosure—Cause of Action—Limitation.

Proceedings in foreclosure are irregular and invalid unless a copy of the application accompanies the notice, as required by Regulation XVII. of 1806.

A mortgagee by conditional sale has a right of entry immediately after default, and the Regulations do not debar him from the stipulated possession. Limitation runs from the date of such default; no new cause of action arising upon foreclosure.

MARKBY, J.—In this suit the plaintiff alleged that one Sookh Monee Dossee had obtained by gift from her husband two estates, Cossimpore and Nowparah, containing 26 mouzabs, and recorded in the Collectorate under the Nos. 196 and 193 respectively. The plaintiff states that Sookh Monee, being in possession of this property, borrowed from Jumna Doss and Kishen Doss the

sum of Rs. 25,000, and as a security on the 27th of Srabun 1200 executed in his favor a mortgage of the property by way of conditional sale. The plaint also alleges that during Sookh Monee's life-time the defendants purchased her rights at an auction-sale and got into possession; that the rights of the mortgagees were purchased by the plaintiff on the 18th of Bysack 1273; and that he issued notices of foreclosure to the defendants, who failed to pay the money within time, and so the conditional sale became absolute on the 23rd August 1868, whereupon the plaintiff brings this suit for possession.

The defendants call upon the plaintiff to prove his title as mortgagee; but that point has not yet been enquired into in the Lower Court; the suit of the plaintiff having been tried and dismissed upon the two following issues only: (1) Whether or not notice of the *bybat* (i. e., foreclosure) had been regularly served? (2) Whether the suit is barred by lapse of time, and whether the limitation in this suit should run from the date of realization of money prescribed in the *kut-kobalak*, or from the date of the foreclosure proceedings, or purchase by the defendant?

The Subordinate Judge found that the notice of foreclosure had been properly served upon all the parties,—the purchasers of Cossim-pore, the purchasers of Nowparah, and the original mortgagors.

Upon the other issue, relying upon a decision reported in the 14th Moore's Indian Appeals,* the Subordinate Judge held that a suit against a purchaser whose possession is *bond fide*, and without notice by a mortgagee founded on the title to enter into possession by reason of a default having occurred, ought to be brought within 12 years after the commencement of the purchaser's possession. The Subordinate Judge then goes on to say that there is no dispute in this case as to the purchasers from the mortgagor having been more than 12 years in possession, and having purchased *bond fide*: and with regard to their having purchased with notice of the mortgagee's title, he finds that an attempt which has been made to prove that notice was given through the Sheriff of Calcutta had failed; and therefore, considering that the case falls within the decision of the Privy Council, he dismissed the suit as barred by limitation.

I deem it convenient first to dispose of the questions of fact which have been raised before us in the appeal. It has been contended for the plaintiff that notice of the mortgage is proved to have been given to the purchasers, but I see no reason to differ with the finding of the Subordinate Judge upon that point. All that is proved is that Mr. Gillanders, the attorney of the mortgagee, wrote and sent

* 15, W. R., P. C., 24.

to the Sheriff the letter set out at page 26. From this we are asked to presume that the Sheriff gave notice of the mortgage at the time of sale. I do not think it safe to presume this: there is no evidence whatever of the practice of the Sheriff's office in this respect.

With respect to the service of notice of foreclosure, I think there is no ground for disagreeing with the Subordinate Judge as to the service of notice in due form upon Nursingh Dass and the other purchasers of Cossimpore. Even if the answers of Nursingh Dass at page 68 cannot be treated (as the Subordinate Judge would treat them) as an admission of service of notice, they certainly are not as clear and explicit a denial as I should expect. On the other hand, I think the evidence of Suheerooddeen, the peadah who served the notice, is reliable. Of course, it is not improbable that he should forget having served this notice, but I think in a matter of this kind, the report which he made in the usual course of business to the nazir, and which he swears to be a true report, may be looked at. This report is on the record and should have been inserted in our printed book; and it appears from the nazir's evidence (which is also on the record and should also have been printed) that it was made according to the usual course of business in the office. I think, therefore, that in the absence of any very

satisfactory contradiction, we may assume that a copy of the notice of foreclosure was affixed to the door of the house, together with a copy of the application, that the requirements of Section 8 of Regulation XVII. of 1806 have been thereby complied with; and that therefore the foreclosure proceedings as against the purchasers of Cossimpore have been regularly taken.

With regard to the purchasers of Nowparah, I think it is proved that the notice of foreclosure was delivered at the house of Girish Chunder Banerjee, the auction-purchaser; but I can find no proof whatsoever that the notice was accompanied by a copy of the application to the Judge, as required by Section 8 of the above Regulation. The words of the Regulation are express that the Judge shall cause the mortgagor or his representatives to be served with a copy of the application; and it has been, I believe, always considered that proceedings in foreclosure are not regular unless a copy of the application accompanies the notice. (See the Constructions of the Sudder Dewanny Adawlut, No. 604, June 24th, 1831.) It was said that it was altogether unnecessary that this should be done, and that in fact all the information which the purchasers could make any use of was given by this notice. But I do not feel justified in saying that the mortgagor or his representative loses his right of redemption,

when one of the formalities expressly required by the Regulation has not been fulfilled.

Upon the evidence I do not think it possible to hold that a copy of the application was served with the notice. The notice recites that a copy of the application (in the notice called the petition) was sent therewith. But in the order of Mr. Justice Phear, in the return of the Sheriff, and in the deposition of Kristo Roy, only a notice is mentioned; and according to the practice of this Court on the original side, had the application accompanied the notice, it would have been so mentioned in the order of Mr. Justice Phear and the return of the Sheriff.

It seems to me, therefore, that if it be necessary for the plaintiff's case to show as against the purchaser of Nowparah that the mortgage had been foreclosed, this has not been done.

It remains to consider whether the suit should have been dismissed as against all the defendants on the ground of the statute of limitation. I will first take the case of the purchasers of Cossim-pore, and as regards these defendants, the case stands in precisely the same position as it did before the Subordinate Judge. These persons acquired their title by a purchase in good faith without notice of the mortgage; they were in possession for more than 12 years prior to this suit, but within 12

years of their purchase proceedings for foreclosure were duly taken, and within the 12 years the year of grace expired. In the case in the Privy Council upon which the Subordinate Judge relied, the real facts were wholly different from the present case. The Privy Council, however, expressed their opinion as to what would be the effect of the statute of limitation, if the facts had been such as one of the parties unsuccessfully asserted them to be. These hypothetical facts were that a purchaser at a sale in execution of a decree against a mortgagor had got into possession and remained in possession for 12 years before the suit was brought. That is also the case here, but there is this distinction that in the hypothetical case which was being dealt with by the Privy Council, it is assumed that no proceedings by way of foreclosure had been taken against the purchaser, whereas in the case with which I am now dealing (that of the purchasers of Cossimapore) such proceedings have been taken.

The same distinction may be drawn between this present case, so far as it relates to the defendants who are the purchasers of Cossim-pore and the later decision of the Privy Council in *XIV. Moore's Indian Appeals*, p. 144;* where also no proceedings by way of foreclosure had been taken which were

* 16, W. R., P. C., 33.

effectual against the mortgagor. The only other difference which was suggested on the argument between these two cases in the Privy Council and the case of the purchasers of Cossimpore is, that in the second and apparently in the first also of the cases before the Privy Council, the mortgage was in the English form, and not in the form of mortgage under which the plaintiff here claims. In the two cases to which I have referred, the suit against the purchaser who had been 12 years in possession was held to be barred; so that as regards the purchasers of Cossimpore, our decision will depend upon how far these two distinctions affect those decisions.

Now, in order to enable us to appreciate the value of these distinctions, we must consider what the law of limitation is as applicable to a mortgagee seeking to recover possession of the mortgaged property. It is sufficient to advert to the law as laid down by Act XIV. of 1859 which governs the present suit. The only provision in that statute which is applicable is that contained in Section 1, Clause 12, which provides that in suits for the recovery of immovable property, the suit should be instituted within 12 years from the date when the cause of action arose. Now the cause of action would arise when two things have occurred: that the plaintiff had a right to possession, and that the

defendant was holding possession not permissively and acknowledging the plaintiff's right, but relying upon his own right, or adversely as it is called. If the plaintiff had not a right to immediate possession, or if, having a right to possession, the defendants were holding with the plaintiff's permission and acknowledging his right, no suit could be brought in the one case because the right to possession had not accrued, and in the other because it had not been disturbed or denied. Now it has been contended for the plaintiff that under a conditional sale in this form no right of entry accrued until foreclosure, but it seems to me impossible to hold that consistently with the provisions in the deed which is before us, and which is operative, except so far as the Regulations of 1793 and 1805 prevented its being so. The deed recites that the mortgagor had received Rs. 25,000; that the nett annual profits of the property are Rs. 3,000; that in liquidation of the interest, the mortgagee is to receive that amount from the ijaradar under the mortgagor; that the money borrowed is to be repaid on the 26th Assar 1262 (9th of July 1855); and then follows this Clause:—"If I do not repay the whole money within the period, then this conditional bill of sale will be reckoned as a true and absolute bill of sale; my and my successor's rights will cease to the said zemindaree; the proprietary

rights with the rights of gifts and sale to it will accrue to you and your successors; and registering your names in the serishtah of the Collectorate, you will take possession of it in the Mofussil; and, on payment of revenue, you, your sons, grandsons, &c., will continue to have felicitous occupation and possession thereof." Now the law has provided that if the mortgagee take possession, he is accountable to the mortgagor for the profits which he has received. The law has also provided that if the mortgagor desire to redeem the property, he may do so within the period specified in the statute of limitation, unless the mortgagee shall in the meantime have taken proceedings for foreclosure: and the effect of these provisions is no doubt greatly to curtail the rights which the mortgagee has stipulated for. But one of the rights here expressly stipulated for is the right to possession, and the law has nowhere provided that this right shall not be exercised by the mortgagee. There is indeed a case in which it appears to be laid down that the mortgagee under a conditional sale has no right of possession until foreclosure (*Sudder Dewanny Adawlut Reports*, 1857, p. 1818), but I cannot reconcile that with the two decisions of the Privy Council to which I have referred. In both these cases, the property was situated in the Mofussil, and it would, I think, be impossible to hold that

the mortgagee of property in the Mofussil under a mortgage in the English form had a right to the possession, and a mortgagee by conditional sale had not. In both cases the mortgagee has contracted for the possession at a certain date, and, therefore, if he be debarred from his right to possession, it must be by reason of the Regulations. But the Privy Council has given a construction to the Regulations which is, that they do not debar the mortgagee from possession, if he has stipulated for it after default. But, on the contrary, on default the right of entry immediately accrues. It seems to me, therefore, that the first distinction relied on avails nothing, and that the plaintiff under this deed of conditional sale had the same right of entry after default as the mortgagees had in the two cases decided by the Privy Council.

But it is said that even if the plaintiff had a right to possession, he had no cause of action, because the possession of the purchasers was not adverse. This argument is, I think, also answered by the observations of the Privy Council in XIV., Moore's Indian Appeals, p. 111,* where it is said:—"Their Lordships think that the title of a judgment-creditor, or a purchaser under a judgment-decree, cannot be put on the same footing as the title of a mortgagor, or of a person

* 16, W. R., P. C., 19.

claiming under a voluntary alienation from the mortgagor. They are of opinion that the possession of a purchaser under such circumstances is really not the possession of a

* This is so printed in all the books, but *quære*, whether it should not be "in privity with the mortgagor."

person holding* in priority of the mortgagor, or holding so as to be an acknowledgment of

the continuance of the title of the mortgagee. The possession which the purchaser supposed he acquired was a possession as owner. He thought he was acquiring the absolute title to the property, and that he was in possession as absolute owner."

That was a judgment upon the earlier Regulations. But at page 150 (a case under Act XIV. of 1859) it is said of a purchaser under similar circumstances, "that it is impossible to hold that the defendant, the purchaser, was holding, or supposed that he was holding, by permission of the mortgagee, and when both things concur,—possession by such a holder for more than 12 years, and the right of entry under the mortgage deed more than 12 years old,—it is impossible to say that such a possession is not protected by the law of limitation."

I think, therefore, that there was a complete cause of action against the purchasers of Cossim-pore on the 9th of July 1855 ; and that a suit founded upon that cause of action was therefore barred when the suit was brought.

But it is said, and was pressed strongly upon us by Baboo Gopal Lal Mitter in his very able argument for the appellants, that an entirely new cause of action arose when foreclosure became absolute by the expiry of the year of grace. Now, at first I was inclined to think that some of the decisions in India favored this contention ; but upon a careful examination of all the cases quoted and some others, I am satisfied that whilst there are some decisions expressly against it, there is no decision which countenances it. The doubt has been, not whether the mortgagee is wholly barred when 12 years have elapsed from the time when his cause of action first accrued, but when it can be first said that he has a cause of action. It has nowhere been said that upon foreclosure the mortgagee has a new cause of action, but it has been doubted in some cases whether before foreclosure he had any cause of action at all. This was the ground of the decision in favor of the mortgagee in the case reported in Sudder Dewanny Adawlut Reports, 1857, p 1817. The Court there says :— " The mortgagee's right to possession of the property does not become complete till he has performed certain acts prescribed by law ; consequently as the mortgagee's right to sue to enforce the conditions of his bond is not complete till those acts have been carried out, the date of his cause of action

must be considered to arise from the time when those acts are completed, and not from the date when the money becomes due. The law, moreover, does not compel a mortgagee to complete his right within any fixed period." Clearly, the Court thought that in that case there was no right of entry at all until foreclosure. So, too, in the case decided by a Full Bench of the High Court of the North-Western Provinces on the 2nd May 1867. The Court say:—"We cannot censure in the rule which has been laid down in some of the authorities cited to the effect that as a mortgagee's cause of action arises on the mortgagor's making default, the mortgagee's suit for possession must be instituted within 12 years from the date of default, with allowance for the year of grace, when foreclosure proceedings are instituted at the earliest possible date. A default may be made by the mortgagors, which may give the mortgagee a right to sue or to enter into possession (if he chooses to assert such right), but which may notwithstanding have no effect whatsoever in altering the nature of the mortgage title. So long as the mortgagor in possession, or those who claim under him, assert merely a title to redeem, advance no other title inconsistent with it, such possession must *prima facie* at least be treated as perfectly reconcilable with, and not adverse to, the title of the

mortgagee, and the continuation of the lien on the property pledged."

But this was a suit not between the mortgagee and a purchaser from the mortgagor, but a suit between the mortgagee and the mortgagor herself. There might, therefore, well be reasons for holding that the possession of the mortgagor was not adverse, and it appears that the Courts below had not found that it was so. But so far from saying that if the possession prior to the foreclosure had been adverse, a new cause of action would arise upon foreclosure, the High Court remanded the case with directions which seems to me inconsistent with this view. They say:—"It will be for the Courts to consider the effect of the whole evidence, and whether it tends to show possession by the mortgagors for any, and what number of years adverse to, and inconsistent with, the alleged mortgage title. It is well settled that foreclosure proceedings under the Regulations give no efficiency to transactions not in themselves valid. If there was really no mortgage, the mortgagees having never advanced the money, or if the mortgagors have repudiated the mortgagee's right and have held adversely to them and without recognition of their title for 12 years, they can derive no benefit whatsoever in this suit from the foreclosure proceedings. The mortgagors are entitled to put them to

the proof of a valid and existing mortgage title at the time of foreclosure, and that such title has been finally and duly foreclosed. If such a title is proved, this suit to recover possession is brought within the limited time," and the suit was accordingly remanded. But if foreclosure gives a new cause of action, there was no necessity to remand the suit at all, for the proceedings in foreclosure had only been recently taken.

The case of Preonath Roy Chowdhry v. Rookhun Begum, in the 7th Moore's Indian Appeals, p. 311, is also consistent with the view that no new cause of action arises upon foreclosure. It was held in that case that the suit of the mortgagee was not barred, but the ground of the decision is stated at page 354. After observing that it cannot be laid down, as a rule universally true, that under Regulation III. of 1793, Section 14, a mortgagee is barred after 12 years from the date of redemption fixed by the deed, the Privy Council say:—"The possession of those who claim under the mortgagor, so long as they assert a title to redeem, and advance no other title inconsistent with it, must *prima facie* at least be treated as perfectly reconcilable with, and not adverse to, the title of the mortgagee, and the continuation of his lien on the thing pledged. It is by no means the essence of such a title there, any more than it is here,

that it should be accompanied by an actual continuing possession of the lands. The pledgee may from various causes be reluctant to assume possession of the pledge, or to shorten the period of its redeemable quality." The Privy Council then, after observing that "it by no means follows as a consequence that a mortgagee foreclosing will be able in a suit for possession to make good against all occupants a title to possession," proceed to enquire whether the mortgagee's title to enforce possession was barred; but this enquiry would have been wholly unnecessary if the proceedings in foreclosure gave a new cause of action; for the mortgage in that case was not finally foreclosed until the 25th June 1849, and the suit for possession was brought immediately afterwards.

The decisions which lay down directly that a mortgagee is barred altogether after 12 years' adverse possession are Sudder Dewanny Adawlut Reports (North-Western Provinces), 1853, p. 100; Sudder Dewanny Adawlut Reports (Bengal), 1859, p. 1495; Sudder Dewanny Adawlut Reports (North-Western Provinces), 1854, p. 234, where also previous cases of the like nature are referred to.

So, too, if foreclosure gave a new cause of action, the law of limitation would be thrown into much confusion. No safe title could ever be acquired against a mortgagee in the Mofussil: for as to

mortgages in the Mofussil, no time is prescribed for taking proceedings in foreclosure, and the provision contained in Section 6, Act XIV. of 1859, would not (as is generally supposed) be an exception to the general law in favor of the mortgagee, but it would be a restriction upon the rights of the mortgagee in favor of the parties in possession. This is certainly not the view taken by the Privy Council of this Section at p. 150 of 14th Moore's Indian Appeals. The Privy Council clearly treat this provision as an exception made in favor of the mortgagee, and consider that where this exception does not apply, the only resource for the mortgagee would be to prove that the possession of the mortgagor or his assignee had not been adverse. It seems to me, therefore, that upon the whole, there is nothing in the decided cases to warrant us in holding that a new cause of action arises upon foreclosure.

It has been contended that the mortgagee is at any rate not barred if he commences foreclosure proceedings within 12 years of the date when the possession first became adverse; and brings his suit for possession within 12 years of the expiration of the year of grace. No doubt this suggestion avoids some of the inconveniences which would arise if the right of the mortgagee to foreclose and take possession were wholly unlimited. But

it does not seem to me to rest on any foundation in law. If foreclosure does give a new cause of action, the question whether foreclosure took place within 12 years of default will be immaterial. If, on the other hand, it does not, then the operation of the statute can only be prevented by the institution of a suit. But to take proceedings in foreclosure, in the Mofussil at any rate, cannot be called the institution of a suit. There is no writ of summons; the mortgagor and his representatives are not summoned and cannot be heard; and the action of the Court is purely ministerial. Such a proceeding cannot be called the institution of a suit within the meaning of Act XIV. of 1859 without a straining of language, for which I see no justification.

I have considered this case with reference only to the provisions of the statute law and the decided cases, and not upon any general principles. The relation of mortgagor and mortgagee, being the result of an interference by the Legislature with the expressed intention of the parties, is an anomalous one, and therefore a deduction from general principles cannot always be safely made with regard to it. It is for this reason that I have not considered when the mortgagee becomes the owner of the property mortgaged. It seems to me that where the relation between the parties is so anomalous, it is

impossible to fix this date so as to justify any conclusion from it upon the matter now under enquiry. If it be said that the mortgagee only becomes owner of the property after the expiration of the year of grace, and not before, still I do not think he can be said to *acquire* the property at that date, and thus to acquire a new title to possession.

The result is, that as regards the purchasers of Cossimpoore, I hold first that upon default of the payment of the mortgage debt, the mortgagee had a right to possession; secondly, that the possession which these purchasers obtained upon their purchase was not held by them under the permission of the mortgagee, but as absolute owners; and thirdly, that no cause of action arose upon completion of the foreclosure proceedings. I therefore held that the purchasers of Cossimpoore can successfully set up the bar of limitation.

With regard to the purchasers of Nowparah, they stand in somewhat more favorable position than the purchasers of Cossimpoore. As against them the mortgage has not been foreclosed. The question, therefore, as to whether any new cause of action arises upon foreclosure has no bearing upon the suit as against them; *a fortiori*, therefore, as against them, the suit is barred.

The result is, that in my opinion the decree of the Subordinate Judge dismissing the suit should

be affirmed and the appeal dismissed with costs.

MITTER, J.—I concur in holding that the decree of the Lower Court ought to be affirmed with costs. Out of the many issues which arose from the allegations of the parties to this suit, the decision of the Lower Court mainly dealt with two of them only,—*viz.*: (1) Whether or not notice of foreclosure had been regularly served? and (2) Whether or not the plaintiff's suit was barred by limitation? The Lower Court has decided the first of these issues in favor of the plaintiff, and the second against him. I propose to consider the second question first.

The *kut-kobalah*, or the conditional bill of sale on which this suit is based, was executed on the 27th Srabun 1260 (10th of August 1853), and the amount taken upon it was promised to be repaid on the 26th Assar 1262 (9th of July 1855.) The rights and interests in the mortgaged premises of Sookh Monce Dossee, who executed this document, were sold at a Sheriff's sale in the execution of a decree of the Supreme Court of Calcutta on the 18th December 1856, and purchased by the ancestors of some of the defendants in this case. And ever since their purchase, they and their heirs have been in possession. The plaintiff alleges that he has acquired the entire rights of the original holders of this *kut-kobalah* by purchase, and that he has caused

the notices of foreclosure to be served upon all the defendants, and that the year of grace expired on the 23rd of August 1868.

For the purposes of the adjudication of this issue, I shall assume that all these allegations of the plaintiffs have been proved, although the defendants have joined issue with him upon every one of them. The material portion of the deed of conditional sale which bears upon this question is the following:—"If I do not repay the whole money within the period, then this conditional bill of sale will be reckoned as a true and absolute bill of sale; my and my successor's rights will cease to the said zemindaree; the proprietary rights with the rights of gifts and sale to it will accrue to you and your successors; and registering your names in the *serishtah* of the Collectorate, you will take possession of it in the *Mofussil*; and, on payment of revenue, you, your sons, grandsons, &c., will continue to have felicitous occupation and possession thereof."

The first question that arises in determining this issue is when did the cause of action in this suit arise? The plaintiff contends that it arose on the expiry of the year of grace, and if that contention be correct, the suit having been instituted within 12 years from that time, is not barred by limitation. But I do not think that this contention is correct. From the terms

of the conditional sale set forth above, it is evident that on default of payment within the stipulated time, the mortgagee was entitled to take possession of the properties sold unless restrained by any legislative enactment. It is said that he was so restrained by Regulation XVII. of 1806. This argument entirely proceeds from a misapprehension of the provisions of that law. It is quite clear that parties are ordinarily bound by the terms of their contract, unless by legislative interference one or both of them are set at liberty to modify or annul any of its provisions to which they have mutually consented. The *kut-kobulah* in question expressly reserves to the mortgagee the right of entry upon the mortgaged premises on default of payment within the stipulated time. Regulation XVII. of 1806, or any other law, does not render such a stipulation inoperative between the parties. I am therefore of opinion that the mortgagee in this case immediately on default of payment, which occurred on the 9th of July 1855, was entitled to take possession of the properties mortgaged. Whatever distinction there may be between this case and the Privy Council decision reported in XIV. Moore's Indian Appeals, p. 144,* it is an authority in support of this conclusion, *viz.*, that there is no legislative bar to the exercise of this right of entry by the mort-

* 16, W. R., P. C., 33.

gagee. Therefore it is clear that the right to assume possession of the properties in dispute accrued to the mortgagee so far back as the 9th of July 1855, and unless the plaintiff can make out that his present suit for possession is not based upon that right, but upon some other right which came into existence at a more recent period and within 12 years, his suit must fail as barred by limitation.

Baboo Gopal Lal Mitter with some plausibility has urged that the plaintiff is not now suing for possession on the right of entry which had accrued to the mortgagee on the 9th of July 1855, but upon the right which arose on the day the sale became absolute, the mortgagees not having repaid the mortgage debt within the year of grace allowed by Regulation XVII. of 1806. He further contends that conceding that the mortgagee in this case might have assumed possession immediately after the default in payment had been made, still that possession would have been as a mortgagee, and the plaintiff now seeks to recover not as a mortgagee, but as an absolute owner; therefore the present suit is not based upon the right of entry given by the conditional bill of sale, but upon the right to possession, which is a necessary incident to the right of absolute ownership which has been vested in the plaintiff by the foreclosure proceedings. But is it a correct

proposition to assert that a holder of a conditional bill of sale invariably acquires an absolute right of the mortgaged premises as soon as the proceedings laid down in Regulation XVII. of 1806 (usually called foreclosure proceedings) have been duly carried out? If it is not, the whole argument must fail. I do not think that this proposition is universally correct. The effect of the proceedings laid down in the Regulation in question is simply to bar the right of redemption. That is to say, when the right of ownership in a particular property is divided between two persons standing to each other in the relation of mortgagee and mortgagor, these proceedings when duly carried out have the effect of terminating the right of the one, *viz.*, of the mortgagor, and perfecting that of the other, *viz.*, of the mortgagee. But this pre-supposes the existence of valid and subsisting rights in both of them, and these proceedings are quite ineffectual when this is not the case. For example, under Act XIV. of 1859, which is the law of limitation governing this case, the mortgagor's right of redemption is barred after the lapse of 60 years from the date of the mortgage (see Section 1, Clause 15). In a case where a mortgagee has been in possession for more than 60 years of the mortgaged property, it is not necessary for him to have recourse to the foreclosure proceedings. On the other hand, where

rights of a mortgagee have been extinguished by lapse of time, these proceedings if taken by him would be quite ineffectual. Therefore if, on the day of the expiry of the year of grace, a valid subsisting right of a mortgagee exists in a holder of a *kut-kobalah*, the omission of the borrower to repay the mortgage loan before that date has the effect of transferring the remaining rights of the latter to the former, who acquires from that date absolute ownership in the property mortgaged. But if, on the other hand, the mortgage rights of a holder of a *kut-kobalah* have been extinguished by lapse of time, or other causes, previous to that date, the foreclosure proceedings, even if duly carried out, are entirely ineffectual, and do not affect any person's right in the least. This view of the law is supported by the following observations which occur in a Full Bench decision of the High Court Reports, North-Western Provinces, p. 108 :—"If there was really no mortgage, the mortgagees having never advanced the money, or if the mortgagors have repudiated the mortgagee's rights and have held adversely to them and without recognition of their title for 12 years, they can derive no benefit whatever in this suit from the foreclosure proceedings."

Let us see what are the facts of this case connected with this question. I find that the mortgagee's right to demand possession accrued

on the 9th July 1855. It is not shown that since that date possession has not been withheld from him "in breach of the contract." It is not suggested, far from being proved, that the original mortgagors and the subsequent purchasers have been allowed to remain in possession with the mortgagee's consent, either express or tacit. Notices of foreclosure are alleged to have been served upon one set of defendants in December 1866, and on the other set of defendants in February 1867. Therefore, before the expiry of the year of grace in either case, *i. e.*, on 9th of July 1867, all rights of the mortgagee had been extinguished by lapse of time. In this view of the law, I hold that the plaintiff is not entitled to a fresh start from the date of expiry of the year of grace, and his present claim is therefore barred by limitation.

With respect to the other issue, I agree with my learned colleague, for the reasons given by him, in holding that the service of notice upon the defendants has been proved, but that the plaintiff has failed to establish that the notice upon Grish Chunder Banerjee was accompanied by a copy of the application to the Judge, as required by Regulation XVII. of 1806. I am also of the opinion that this omission has the effect of rendering the foreclosure proceedings against the heirs of Grish Chunder Banerjee invalid and ineffectual.

PRIVY COUNCIL.

THE 21ST MAY, 1874.

Appeal from Calcutta High Court.

MAHARAJAH RAJENDER KISHORE
SINGH,
versus

RAJAH SAHEB PERHLAD SEIN.

Fraudulent or forcible Acquisition
—*Limitation—Regulation II. of*
1805, *Sec. 3.*

Regulation II. of 1805 s. 3, which provides that the limitation of 12 years shall not be considered applicable to any private claims of right to immoveable property, if the party in possession shall have acquired possession by violence, fraud, or other unjust dishonest means, must be considered with some strictness (otherwise the door would be opened widely to a large class of claims which ought properly to be barred), and the alleged fraudulent or forcible dispossession must be clearly established.

In this case the plaintiff and the defendant are two neighbouring Rajahs, each possessing a large tract of land, and the question is to which of their conterminous estates the villages in dispute belong. It would appear that disputes arose between the predecessors of these Rajahs in the early part of this century, and two cross-suits were instituted between them in the beginning of the century. The then Rajah of Ramnugger claimed 12½ tuppehs, and on the other hand the then Rajah of Bettiah claimed some 85 villages, which are said to have formed a mehal called Hamrah. The result was that each failed. The Rajah of Ramnugger failed in establishing his title to those tuppehs, the tuppehs

being accorded to the Rajah of Bettiah, and on the other hand the Rajah of Bettiah failed to obtain the 85 villages, the villages being declared to belong to the Rajah of Ramnugger. In 1861 the present Rajah of Ramnugger instituted a suit against the present Rajah of Bettiah for the recovery of nine villages, alleging them to be part of the 85 villages decreed to his predecessor, and that the Rajah of Bettiah had dispossessed him of them, and he put his case in this way. In 1840, on the death of the then Rance of Ramnugger, the Government laid claim to the estate as having escheated to them for want of heirs and took possession of it; and the plaintiff now alleges that shortly before or upon the Government taking such possession, the Rajah of Bettiah contrived to possess himself of the nine villages in question. The Principal Sudder Ameen, before whom the case came in the first instance, decided against the plaintiff *in toto*. The High Court, being dissatisfied with that decision, remanded the case, and ordered a local investigation. The Ameen who conducted the local investigation reported in favor of the plaintiff as to one of the nine villages only; but the Principal Sudder Ameen adhered to his opinion that the plaintiff was entitled to none.

On the case coming again before the High Court, they came to the conclusion that the evidence of the

plaintiff on the whole preponderated as to three of the villages, and accordingly they decreed to him those three, dismissing his suit as to the other six. There was, however, on the record an issue whether the suit was not barred by the statute of limitations, which was disposed of by the High Court in this way:—"As to limitation, it is clear that if we believe the evidence of the plaintiff regarding the villages we have decreed to him, that plaintiff is in time as regards the villages decreed to him, because the cause of action arose to the plaintiff at a time when it was impossible for him to bring the present suit, until he had first obtained a decree in proof of his own rights of inheritance, and so shown his having a *locus standi* in Court." Their Lordships propose now to deal with this question of limitation, to which the argument before them was chiefly, if not wholly, confined.

The facts bearing upon this question may be shortly stated thus: The Government took possession of the estate in 1840 or 1841. That is the time at which the plaintiff alleges dispossession on the part of the defendant, and therefore the time when his cause of action arose. It appears that the plaintiff brought a suit against the Government and another defendant for the purpose of establishing his title as heir to this estate. A decision was pronounced in his favor in the year

1845 by the Principal Sudder Ameen, which decision was confirmed by the Court of Sudder Dewanny Adawlut in 1846. In 1848 he was actually put into possession, and he remained in possession until 1854. He was afterwards called upon to give further security to abide the event of the appeal, and on his failure to do so, the Court of Sudder Dewanny Adawlut caused the estate to be put under attachment. The appeal was decided finally in his favor in 1858 by the Judicial Committee of the Privy Council, and thereupon he was again put into possession.

The very question now to be decided arose between these same parties in a suit wherein the present plaintiff sought to recover from the present defendants certain other lands which he alleged were within the limits of the zemindary of Ramnugger, and not within those of Bettiah. This suit, though commenced on the same day as the present, came on appeal before this Board in February 1869. In that case, as in the present, it was contended on the part of the plaintiff that the operation of the statute had been suspended by the litigation in which he had been engaged in order to establish his title to his estate and by his dispossession in 1848.

In order to show that the case is precisely in point it is enough to read a few sentences of the judgment. It is reported in the 12th

Moore's Indian Appeals, and at page 341 this is stated:—"If, however, it were granted that a right of action accrued to the appellant at the date of the thakbust proceeding" (that would be the year 1845, three or four years later than the cause of action would arise in the present case), "and their Lordships think it impossible on the evidence to fix the dispossession at a later date, the suit would nevertheless fall within the 12 years limitation, unless the appellant could show that he is entitled to deduct the whole or some part of the period between February 1848 and the beginning of 1858," "and to support this claim to deduction he must show that during the period to be deducted, he was, in the words of the Regulation, 'from good and sufficient cause precluded from obtaining redress.' Their Lordships would have great difficulty in affirming the proposition that such good and sufficient cause had here been shown to exist. The appellant's title to the Raj of Ramnugger was established in the Courts of India in September 1846. He was put in possession of the property in June 1848, though between May 1854 and some day in the beginning of 1858 it was again under attachment. How can it be said in these circumstances he was between 1848 and 1858 precluded from maintaining a suit for protecting his zemindary and recovering lands taken from it by encroachment? It would be very danger-

ous in their Lordships' opinion to lay down as a rule that the pendency of an appeal to England puts the party who, subject to that appeal, is the owner of an estate, under a legal disability to bring a suit in that character against third parties." Their Lordships therefore affirmed the decision of the Indian Court, which in that case had held that the statute of limitations was a bar to the plaintiff's claim.

Their Lordships consider themselves precluded from considering whether the present case is taken out of the statute by the exception in Section 14 of Regulation III. of 1793,—viz., "or shall prove that from minority or other good and sufficient cause he is precluded from obtaining redress," because this question is actually *res judicata* by this very tribunal between the same parties. It has, however, been argued on the part of the plaintiff that in this case he brings himself within an exception to be found in the subsequent Regulation II. of 1805, Section 3 :—The limitation of 12 years fixed by Section 14, Regulation III., 1793, Section 8, Regulation VII., 1795; and Section 18, Regulation II., 1803, shall also not be considered applicable to any private claims of right to lands, houses, or other permanent immoveable property, if the person or persons in possession of such property when the claim of right thereto may be preferred in a competent

Court of judicature shall have acquired possession thereof by violence, fraud, or by any other unjust dishonest means whatever ;” and the Regulation goes on to say that if the plaintiff seeks to exempt himself from the ordinary rule, he must state the fraud or violence in his declaration or replication. It has been argued that the plaintiff does sufficiently state a case of dispossession by fraud and violence in his plaint and subsequent statement by his pleader, and that the evidence is sufficient to satisfy their Lordships that he was dispossessed by fraud or violence within the meaning of the words of this statute. Although it may be perhaps fairly contended that there is a sufficient statement in the declaration to bring the plaintiff within this exception, no issue appears to have been directed to this question, and the attention of the High Court does not appear to have been directed to it at all, inasmuch as they confined their attention entirely to the question whether the plaintiff could bring himself within the exception of Section 14 of Regulation III. of 1793. But their Lordships nevertheless are asked to consider the evidence and to say that the plaintiff has brought himself within this exception. They think it right to observe that this is an exception which they think must be construed with some strictness, for the door would be opened widely to a large class of claims

which ought properly to be barred by limitation, if at any period less than 60 years a plaintiff were enabled to evade the operation of the Statute of Limitation merely by alleging and giving some evidence of fraudulent or forcible dispossession. Their Lordships think that such fraudulent or forcible dispossession must be clearly established.

Applying their minds to the evidence which has been relied upon on the part of the plaintiff, they have to observe in the first place that in the suit as originally brought and heard before the Principal Sudder Ameen there was no allegation of violent or fraudulent dispossession. There was simply a statement of dispossession. Upon the case being remanded, evidence of dispossession was brought forward for the first time, and it was to this effect:—With respect to each of the three villages—(and their Lordships believe with respect to each of the nine also,)—one or two witnesses depose to the agents of the Rajah of Bettiah having come upon the land while the put-waree was in the act of collecting the rents ; that they happened to have found upon him the rent-rolls and official documents connected with the land ; that they took them forcibly from him, and expelled him and took possession. The same story is told in each of the cases, and what appears more singular, it is also said that although the attention of the Govern-

ment authorities was called to the matter they refused to take any notice of it. It should be recollected that the putwaree then dispossessed was the putwaree acting on behalf of the Government, and it is further to be observed that the plaintiff himself states more than once that he received all these 85 villages from the Government, who were in possession of them, without making any statement at all as to this alleged forcible dispossession. It is further to be observed that the Principal Sudder Ameen would appear to have wholly disbelieved this evidence, and that the attention of the High Court was never called to it.

Under these circumstances their Lordships have no difficulty in coming to the conclusion that no such fraudulent or forcible dispossession has been proved as would bring the plaintiff within the exception of Section 3 of the Regulation of 1805, and they feel bound to decide that the plaintiff's claim is barred by the statute of limitations. The plaintiff's suit must be dismissed upon that ground; and it is therefore unnecessary for their Lordships to express any opinion upon the merits of the case.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be reversed, that the suit of the respondent be dismissed, and that the appellant have his costs in both the Courts below and of this appeal.

PRIVY COUNCIL.

THE 6TH MARCH, 1874.

Appeal from Calcutta High Court.

TACCOORDEEN TEWARRY,

*versus*NAWAB SYED ALI HOSSEIN KHAN
and others.

Declaratory Decree—Confirmation of Possession—Fraudulent Sale—Onus Probandi—Evidence of Bonâ fides.

In a suit for confirmation of their possession of certain mouzahs, plaintiffs as heirs of a deceased lady also prayed that it might be done after reversal of a summary proceeding and after setting aside a fraudulent and fabricated deed of sale alleged to have been made by her in favor of defendant (her occasional man of business) while living alone and apart from her natural advisers. The first Court decreed the suit, confirming plaintiffs' possession and setting aside the deed. The High Court, holding that plaintiffs had no possession, reversed so much of the decree as confirmed plaintiffs in possession, and gave a declaratory decree concluding that they could not give substantive relief:

Held that the High Court erred in that conclusion, for the prayer of the plaint that the deeds might be set aside was a prayer for substantive relief.

In a suit for setting aside deeds, some evidence ought to be given by the plaintiff in order to impeach the deeds he seeks to set aside. But in the case of sales or gifts made by a lady in such a position as that of the lady from whom defendant claims, the strongest and most satisfactory proof ought to be given by the person who claims that the transaction was a real and *bonâ fide* one, and fully understood by the lady.

This was a suit brought by the respondents against the present appellant, Taccoordeen Tewarry, for a confirmation of their possession of certain mouzahs; and their

plaint, which declared that their suit was for that confirmation, also prayed that it might be done after a reversal of a summary proceeding, and, which is the most important part of their prayer, after setting aside a fraudulent and fabricated deed of sale set up by the appellant. The deed which is sought to be impeached is of the date of the 23rd of July 1861. The respondents are the heirs of Mussamaut Koodrtonissa, a purdanasheen lady, who some time before her death seems to have had some dispute with her relatives, and went to reside in the town of Patna. The appellant, Tacoordeen Tewarry, was living in Patna; and in the course of the evidence given in this suit it was stated by the witnesses on the part of the plaintiffs that Mussamaut Koodrtonissa went to live in his house; that she died there; and that he had acted on several occasions as her mooktear. The deeds which are impeached are a deed of sale of the mouzahs from the lady to Tacoordeen Tewarry, professing to be made in consideration of a sum of Rs. 39,501 (a large part of which, namely, Rs. 17,960, is stated to have been paid to a creditor of the lady), and a mooktearnamah for the execution of that deed.

When the case came before the Principal Sudder Ameen, evidence was gone into on both sides; on the part of the plaintiffs to show that they were in possession of the

property, and also to impeach the validity of the deeds on the ground that they were forged and fabricated and that there had been no real sale from the lady to the appellant. The appellant went into evidence to show that he had been in possession of the property subsequently to the date of the alleged deed during the life-time of the lady, and had continued in possession up to the time of the suit, and also to show that the deeds were really executed and that the consideration-money had passed. Upon a review of the evidence on both sides, the Principal Sudder Ameen came to the conclusion that the plaintiffs were in possession of the property and that the deeds were fabricated; and he made a decree confirming the plaintiffs in the possession, and directing that the deeds should be set aside. The appellant appealed to the High Court, and that Court disagreed with the Principal Sudder Ameen as to his finding upon the possession of the property. They thought that upon the whole of the evidence the respondents had not proved their possession, and, in fact, that the possession was with the appellant. Being of that opinion, they reversed so much of the Principal Sudder Ameen's decree as confirmed the plaintiffs in their possession, holding that they had no possession which could be the subject of confirmation. The High Court then went into the consideration of the substance of the dis-

pute,—namely, whether the deeds were genuine deeds or not. In approaching that question they seem to have assumed that they could only deal with it by way of declaration, and they came to the conclusion that they had power to declare the title to the estate, but could not give any substantive relief. Their Lordships think that they erred in coming to that conclusion; the plaintiff prayed that the deeds might be set aside, which is a prayer for substantive relief, and the Principal Sudder Ameen was quite right when he came to the conclusion on the facts that the deeds ought to be set aside in making a decree to that effect. However, the form in which the High Court considered the question does not really alter the substance of their decision. They, after a full and careful review of the evidence, came to the same conclusion as the Principal Sudder Ameen,—namely, that these deeds had not been executed by the lady.

It was contended by Mr. Bell that the High Court ought not to have thrown the onus of supporting the deeds upon the appellant; and perhaps the mode in which the High Court treat this question may not be strictly correct. In a suit for setting aside deeds, some evidence ought to be given by the plaintiff in order to impeach the deeds he seeks to set aside; but the Court seem to have regarded this suit as if it were an action of eject-

ment brought by the appellants as the heirs of the deceased lady, in which, having proved that they were her heirs, the burden was thrown upon the appellant to show a better title. But although the Judges do not quite correctly state the principle of fixing the onus, their judgment is substantially right, because the plaintiffs did not put their case before the Principal Sudder Ameen simply upon their title as heirs, and throw it upon the appellant to prove a better title, but they did, by evidence, challenge the validity of the deeds. They called witnesses to show the circumstances under which this lady lived, and to challenge proof of the consideration having passed which the deed alleges to have been given. It may be that the evidence is weak, but the appellant accepted the onus which that evidence *prima facie* cast upon him; and he went into his whole case, and gave the evidence that he thought would best support it. Upon a review of that evidence, the High Court came to the conclusion that it was utterly insufficient to establish the validity of the deeds under the circumstances of the case.

Now the circumstances of the case are that this lady was a purdahnusheen living apart from her relations; whether in the house of the appellant or not, may not be distinctly proved, but certainly in a place where she was without those

natural advisers which a lady, when she was going to part with apparently the whole of her property, ought to have around her. She, whilst thus alone and unprotected, is supposed to have made a deed in favor of a person who, on some occasions, acted as her man of business. According to the principles which have always guided the Courts in dealing with sales or gifts made by ladies in such a position, the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them that the transaction was a real and *bona fide* one, and fully understood by the lady whose property is dealt with. So far from giving satisfactory evidence on these points, the appellant has failed to produce that which clearly was within his power, and which ought to have been given even in an ordinary case of a sale that is at all impeached. It is alleged that the deed of sale was executed by the lady herself, and also by a mooktear called Mookondee Lall, who had a mooktearnamah from her for that purpose. The mooktearnamah is filed, and appears upon this record; but Mookondee Lall, the mooktear who is supposed to have executed this deed, is not produced as a witness. Again, the execution of the mooktearnamah is supposed to have been verified by the Nazir and three witnesses, the Nazir having afterwards reported to the Principal Sudder Ameen

who registered the document. The Nazir and those three witnesses have not been called. And further, the writer of the deed of sale himself, who was present according to the evidence at the time when the deed was executed, is also kept out of the witness-box. The deficiency of this important evidence is attempted to be supplied by the testimony of witnesses who say they were present at the execution, but who, as compared with those who would have been the authentic witnesses of the transaction, are not at all fit to be relied upon. Their Lordships also agree with the High Court that there is no trustworthy evidence of the payment of the purchase-money, either by satisfying the alleged claim of a creditor of the lady, or otherwise.

The case on the part of the appellant was attempted to be supported by the evidence of proceedings which had taken place in the life-time of the lady in rent-suits, and in a suit in which there was a contest between the lady and her relatives. Documents in those suits referred to the sale; and authenticity is endeavoured to be given to the transaction in consequence of the lady herself having recognized it. But there is an entire absence of satisfactory proof that those documents, which are said to contain confirmatory evidence of the transaction, were executed by the lady, or that, if

she did execute them, their contents were known to her.

On the whole, therefore, their Lordships entirely agree with the substance of both the decisions below that these deeds are not genuine and ought to be set aside.

Their Lordships think that the decree of the Principal Sudder Ameen was correct in form as well as in substance. The High Court, acting on their opinion that they could only make a declaration of title, whilst professing to confirm (except as to the possession) the Principal Sudder Ameen's decree, really vary its terms by inserting a general declaration that the plaintiffs are the rightful owners of the property, instead of the specific order that the deeds should be set aside. They reversed the decision of the Principal Sudder Ameen with regard to the possession,—a

a reversal in which their Lordships concur,—and added what follows in their formal decree, “and that so much of the decree of the said Court as declares that the said plaintiffs are the rightful owners of the said property be confirmed.” Their Lordships think that as the plaintiff had prayed for substantive relief, namely, that the deeds should be set aside, the more correct form of decree is in the terms of that prayer.

Their Lordships will, therefore, humbly advise Her Majesty to vary the decree of the High Court by striking out so much thereof as purports to confirm the decree of the Principal Sudder Ameen, and to order that in lieu thereof so much of the last-named decree as ordered the deed of sale and the mook-tearnamah to be cancelled and set aside be affirmed.

CALCUTTA HIGH COURT.

*The 10th June, 1874.*The Hon'ble W. Ainslie and Romesh
Chunder Mitter, *Judges*.THE QUEEN, *vs.* GOPEE MOHUN
MITTER, (*Appellant*.)*Act X. of 1872, Sec. 188—Kidnap-
ping—Compounding—Acquittal.*The offence of kidnapping can be lawfully
compounded.Where a charge of such an offence was
withdrawn by the complainant, it was held
that under Sec. 188 of the Code of Criminal
Procedure it had the effect of an acquittal.

AINSLIE, J.—The prosecutor made a verbal complaint to the Magistrate of Beerbhoom against Gopee Mohun Mitter, a cooly recruit, to the effect that the latter had kidnapped his daughter, a girl under 16 years of age, for the purpose of sending her to Assam as a cooly. The Magistrate hereupon made a verbal order to the police to bring the complainant and accused, together with their witnesses, before the Court. When this order was carried out, it appeared that the parties had come to terms, and the prosecution was allowed to drop and the accused was discharged.

Gopee Mohun Mitter having been subsequently re-arrested in Howrah was tried there and convicted by the Court of Session under Section 363 of the Indian Penal Code of the offence of kidnapping.

He now appeals and pleads previous acquittal.

The record of the proceedings before the Magistrate of Beerbhoom,

so far as appears from the papers before us, consists of nothing but a police report with the order of discharge endorsed thereon. This report sets out in the heading the nature of the offence which the police officer supposed the prisoner to have been charged with, and this agrees with the evidence given in the case before us. I think it is clear that the offence then charged was identical with the offence of which the prisoner has been now convicted, and that we must hold that this offence had been compounded with the permission of the Court. The question before us is simply whether the offence of kidnapping can be lawfully compounded. If it can be so compounded, the withdrawal of the complainant from the first prosecution must, under Section 188 of the Criminal Procedure Code, have the effect of an acquittal.

On referring to the Penal Code, Section 214, it appears that a certain class of offences is excepted from the penal operation of that and the preceding Section; or in other words, may be lawfully compounded. These are "cases in which the offence consists only of an act irrespective of the intention of the offender, and for which act the person injured may bring a civil action."

In this case the offence of which the accused has been convicted is simply kidnapping as punishable under Section 363. It has not

been found that there was an intention to commit any further offence. The recruiting of coolies and forwarding them to Assam is not in itself an offence at all. Thus this case is covered by the first part of the exception. And I am of opinion that it is also covered by the second part of the exception.

There is no ground on which we should hold that a parent or guardian cannot bring an action for damages against a person who kidnaps a child from his custody, and it is unnecessary to consider whether the damages recoverable are to be limited to compensation for the loss of time and money expended in searching for and recovering the child, or not. This at least he may sue for and recover, and this is enough to bring this case within the second part of the exception.

The result is that the offence was one which could be lawfully compounded, and that the plea of former acquittal is good.

The prisoner must be acquitted and released.

CALCUTTA HIGH COURT.

The 26th January, 1874.

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

THE QUEEN,
versus

DAMU HAREE, (*Appellant*).

*Penal Code, Sec. 75—Attempt—
Previous Conviction—Punishment.*

Section 75 of the Penal Code is restricted to offences under Chapters XII. and XVII. of the Code of Criminal Procedure when the

term of imprisonment awardable is three years' imprisonment and upwards, and does not refer to an attempt to commit any of those offences, nor can any case be brought within it merely because the punishment that may be given for it extends to three years and upwards.

GLOVER, J.—The prisoner in this case has been convicted under Sections 457, 458, and 511 of the Penal Code, and in accordance with Section 75 has been sentenced to transportation for life, he having been previously convicted under the Penal Code of dacoity.

There can be no doubt, I think, of the man's having been caught in the act of breaking into a house by night, but I do not concur in the sentence passed by the Sessions Judge.

In the first place I do not see how Section 75 applies. That Section refers to offences committed and made punishable under Chapter XII. or XVII. of the Code with imprisonment for three years or upwards, and not to an attempt to commit any of those offences. Penal statutes must be strictly construed, and it would not be right to include Chapter XXIII. within the purview of Section 75 when that Section only mentions other Chapters of the Code, and not the one relating to attempts. The Sessions Judge has, I think, mistaken the meaning of the words of the Section. They seem to me clearly to restrict the action of the law to cases under Chapters XII. and XVII. when the term of im-

prisonment awardable is three years' imprisonment and upwards, and not to allow of any case being brought within the Section merely because the punishment that may be it extends to three years and upwards.

The prisoner has been convicted of attempt at housebreaking by night, having made preparation for causing hurt, &c., under Section 458, and the punishment might be therefore by Section 511 one-half of the longest period provided for the substantive offence. Now, under Section 458, the highest punishment awardable would be fourteen years' rigorous imprisonment with fine, so that admitting the circumstances of aggravation in this case against the prisoner, the maximum punishment that can be inflicted on him is seven years' rigorous imprisonment.

I think that the Sessions Judge's sentence should be modified, and the prisoner be sentenced to seven years' rigorous imprisonment. I think moreover that this is a sufficient punishment, bearing in mind that the former offence though technically dacoity was really committed by a band of starving men, and that food was the thing robbed.

KEMP, J.—I concur.

CALCUTTA HIGH COURT.

The 26th May, 1874.

The Hon'ble W. Markby and Romesh Chunder Mitter, *Judges.*

THE QUEEN, *vs.* GHOLAM MAHOMED and others.

Rioting—Common Object—Penal Code, Secs. 447 and 453.

It is necessary, before persons can be convicted of rioting, &c., under Secs. 447 and 453 Penal Code, to ascertain clearly that they have taken such a share in the transaction as will bring them within the criminal charge; and it must appear on the evidence that they had a common object, which common object they were going to carry out by unlawful means.

MARKBY, J.—The charges upon which the prisoners have been convicted in this case are under Sections 147, 149, 447, and 453 of the Indian Penal Code. Now as to the particular parts of the case which might bring the prisoners under Sections 447 and 453, I will notice that presently. It seems to us that the most important part of this case is to ascertain how far the three prisoners at the bar can be made responsible in this case upon the ground that they have acted with a common object, that common object being unlawful or intended to be accomplished by unlawful means. Now the common object with which the Judge considers that they have acted is (as stated by him) the arrest of the men who were supposed to have beaten the khansama in the employ of Captain Browne, whose servants the prisoners also are. That only brings the prisoners within either

Section 117 or 119, if that common object was intended to be carried out by one of the modes specified in Section 111, namely, that they intended to arrest these persons (because that is the only part of that Section which would apply to this case) by resorting to some criminal trespass, or by using some criminal force. In all cases of this description it is no doubt somewhat difficult to ascertain the precise share which each person takes in the transaction, but nevertheless it is necessary, before we can convict these prisoners, to ascertain clearly that they have taken such a share in this transaction as will bring them within that criminal charge. Now they were, as I have said before, servants of Captain Browne, and it appears that Captain Browne, being encamped at the opposite side of the river to the bazar where his khansama was, received intelligence that his khansama had been severely ill-treated, and whether or no that was a matter in which the khansama may have been to blame, as the Judge says, is not important. There can be no doubt that Captain Browne did receive that information, and that he had no reason to doubt that that information was true, nor in the inception of the proceedings does there seem to be anything but what was perfectly natural and reasonable in the conduct of Captain Browne or his servants. All that he did was this; he crossed over the river accompanied by

the prisoners. It is very natural under the circumstances that he should have them with him, and the Judge apparently thinks (and we have no reason to doubt that he is right) that the first intention of Captain Browne was to apply to the police. It appears that very shortly afterwards Captain Browne and the prisoners reached the other side of the river, the police constable Sharafat Khan did come up, and that a large body of persons were collected who are called the bazar people, that is, the people hostile to the khansama; that they were armed; that they spread in different directions; and that a large majority of them went towards the place which is called the naib's cutcherry, where the important part of the occurrence, so far as these prisoners are concerned, took place. Now the Judge has thought it right to make some observations upon the conduct of Captain Browne in coming to the cutcherry. It is no part of our duty here to consider in any way whether Captain Browne acted prudently or imprudently. Our duty is solely confined to considering the conduct of the prisoners, and it appears to me that the prisoners in following Captain Browne to the cutcherry, Captain Browne being at that time accompanied by a responsible police officer, cannot at any rate, whatever opinion a person might form of the conduct of Captain Browne, be considered as having done anything more than what all men might be expected to do under the circumstances. They were acting under their master's order, and their master was accompanied by a police officer. Therefore it cannot for a mo-

ment be supposed that they could contemplate that anything unlawful was to be done by them. There is considerable evidence as to what took place at the time; but the only evidence which bears in any way upon the charges against these prisoners is the evidence of Sharafat Khan, the head-constable, and that evidence has been disbelieved in most important particulars by the Judge himself, and inasmuch as even the very small part of it which relates to the prisoners is flatly contradicted by Captain Browne, we have not the slightest hesitation in accepting Captain Browne's account in preference to that of Sharafat Khan. We have not the least doubt that the account which Captain Browne has given as to what part the prisoners took in this matter is a true account, and we entirely accept it. What he says is this; he denies the assertion of Sharafat Khan that his men went inside; he says that he gave them a strict order not to go inside, speaking in the Persian language, which they understood; and that he himself, for what he considered to be sufficient reason, did go inside the house, leaving his men outside. We are not, as I have said before, to consider whether Captain Browne was right or wrong in going to the inside of the house, and we desire it to be distinctly understood that we express no sort of opinion one way or the other on that point. The point we have to consider is whether or no these prisoners have committed the offence with which they are now charged. Taking, as I have already said (and I think we undoubtedly ought to do so), Captain Browne's account as a true one, it is perfectly clear that these

persons never went inside of this house at all. The result is that we have simply these facts against these persons. They are the servants of Captain Browne, and they accompanied their master to the naib's cutcherry for the purpose, apparently, of assisting the police in arresting the persons by whom the khansama was then said to have been beaten.

It seems to me that on that evidence there is nothing at all upon which we can say that they have had any common object, which common object they were going to carry out by any unlawful means whatever. In all probability, not speaking the language of the country, they may have only got imperfect information as to what was being done. But their duty was to obey their master's order; and they did so. Whatever Captain Browne may have intended to do in this matter, in all probability, these persons simply followed him in obedience to his directions. Under these circumstances there is really no evidence upon which we can say that they were acting with a common object which they intended to carry out by any unlawful means. The importance of this is this, that when once we have removed any common object of unlawful kind, the prisoners then remain responsible only for the acts which they actually committed themselves. Of course, if there had been any common object proved between the large number of persons, railway police, khallasies, and other persons who were present on the spot, and if that common object had been shown to be an unlawful one, all these persons would have been guilty of

being members of an unlawful assembly, and they would have been punished for the acts of each other. But I do not think that is the case here, and therefore we not only get rid of all the charges under Sections 147 and 149, but as regards the other two Sections, 447 and 453, we have the prisoners only responsible for the acts which they themselves have committed. Now even taking the evidence of Sharafat Khan, it would be very difficult indeed to convict the prisoners either under Section 447 or 453. There is nothing to show in that evidence that these prisoners either committed, or intended to commit, any violence at all. But as we have said, we have not accepted that evidence, and we have accepted the evidence of Captain Browne. Under these circumstances neither as regards Sections 147 and 149, 447 nor 453, is there any evidence at all which can be relied on against these prisoners.

We think therefore that the conviction and sentence as against these prisoners must be set aside, and that they must be discharged.

BOMBAY HIGH COURT.

The 27th March, 1873.

REG, *versus* JAIMAL SHRA'VAN.

Prevarication—Intentionally causing interruption to public servant—Ind. Pen. Code, Sec. 228—Code of Criminal Procedure, Sec. 435.

Prevarication by a witness may, though it does not necessarily, amount to contempt of Court within the meaning of Sec. 228 of the Indian Penal Code and Sec. 435 of the Code of Criminal Procedure.

This was a reference, under Section 296 of the Criminal Procedure Code, by G. A. Hobart, Session Judge of Khandesh, for the orders of the High Court.

The accused, Jaimal, was convicted by W. A. East, Magistrate 1st class, under Section 228 of the Indian Penal Code, of wasting the time of his Court by prevaricating whilst giving evidence as a witness, and fined a sum of Rs. 4. The Session Judge was of opinion that this conviction, under the ruling in *Reg. v. Aubá Bhivráo (a)*, was illegal and ought to be set aside.

The reference was heard by Melvill and Kemball, J.J.

PER CURIAM:—The Court is not prepared to hold, as a matter of law, that no amount of prevarication on the part of a witness will constitute the offence specified in Section 228 of the Indian Penal Code; nor does the Court think that the Judges, who decided the cases reported at pages 6 and 7 of Volume 4 of the Bombay High Court Reports, went so far as this. The head notes of those cases seem inaccurate. All that the decisions show, is that the finding of the Magistrate did not clearly specify that there had been an interruption. In other words, it was held, not that prevarication could not constitute an interruption, but that it was not necessarily an interruption. In the case of *Legina v. Abdul Rahiman* (see statement of Criminal Rulings, dated the 16th of March 1871) it was held that prevarication by a witness and refusal to answer a question might amount to intentional interruption within the meaning of Section 228 of Indian Penal Code, and Sec. 163 of the old Code of Criminal Procedure.

Papers to be returned

(a) 4, Bom. H. C. Rep., Cr. Ca. 6.

being members of an unlawful assembly, and they would have been punished for the acts of each other. But I do not think that is the case here, and therefore we not only get rid of all the charges under Sections 147 and 149, but as regards the other two Sections, 447 and 453, we have the prisoners only responsible for the acts which they themselves have committed. Now even taking the evidence of Sharafat Khan, it would be very difficult indeed to convict the prisoners either under Section 447 or 453. There is nothing to show in that evidence that these prisoners either committed, or intended to commit, any violence at all. But as we have said, we have not accepted that evidence, and we have accepted the evidence of Captain Browne. Under these circumstances neither as regards Sections 147 and 149, 447 nor 453, is there any evidence at all which can be relied on against these prisoners.

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The reference was heard by McVill and Kemball, J.J.

PER CURIAM :—The Court is not prepared to hold, as a matter of law, that no amount of prevarication on the part of a witness will constitute the offence specified in Section 228 of the Indian Penal Code; nor does the Court think that the Judges, who decided the cases reported at pages 6 and 7 of Volume 4 of the Bombay High Court Reports, went so far as this. The head notes of those cases seem inaccurate. All that the decisions show, is that the finding of the Magistrate did not clearly specify that there had been an interruption. In other words, it was held, not that prevarication could not constitute an interruption, but that it was not necessarily an interruption. In the case of *Liegina v. Abdul Rahman* (see statement of Criminal Rulings, dated the 16th of March 1871) it was held that prevarication by a witness and refusal to answer a question might amount to intentional interruption within the meaning of Section 228 of the Indian Penal Code, and Section 163 of the old Code of Criminal Procedure.

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(a) 4, Bom. H. C. Rep., Cr. Ca., 6.

